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DEPARTMENT OF LAW

[1942] II M.L.J.
June—December.

PUBLISHED BY
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Advocate, High Court, Mylapore, Madras.

PRINTED AT THE MADRAS LAW JOURNAL PRESS, MYLAPORE.
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1942.

CUK-H03402-76-LP2345

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PRINTED AT THE MADRAS LAW JOURNAL PRESS, MYLAPORE, MADRAS.

LAW COLLEGE

THE
MADRAS LAW JOURNAL.

II] JULY [1942

THE HINDU LAW OF SUCCESSION BILL.
(L.A. BILL No. 27 OF 1942)

We note with pleasure that many of the suggestions made in the columns of our Journal in reviewing the Memoranda[1] on the Hindu law of succession issued by the Hindu Law Committee have been incorporated in the Bill on the law of succession that has just been introduced in the Central Legislative Assembly by the Government of India. The prescriptions that all the widows of a deceased person, where there are more than one, should cumulatively take a share, that the illegitimate son should drop out of the line of heirs, that the widow of a pre-deceased son and the widow of a predeceased son's predeceased son shall have no heritable capacity to their father-in-law and grandfather-in-law respectively, that a daughter shall not be excluded by a son or a widow and shall take a half share, that there shall be no discrimination between daughters, etc.. will command general approval. The doctrine of absolute estates for women will result in the removal of one of the disabilities founded on sex and will place Hindu women on a par with their Mussalman, Christian and Jaina sisters.

It is to be regretted that it has not been possible to introduce even at the outset a Bill covering all the branches of Hindu law. That would have facilitated an approach to and appreciation of the changes proposed from the proper perspective. That apart, there are certain comments which we should like to make in regard to the provisions of the Bill as they stand.

The Bill makes it clear that it is not to apply to agricultural lands. One of the essential objects of the legislation, namely, to abolish the several schools of law and evolve a uniform system of laws for all Hindus, may well be frustrated if it is left to the Provincial Governments to sponsor complementary legislation. How they may not react promptly or properly is illustrated by the sequel to the advisory Opinion delivered by the Federal Court in In the matter of *The Hindu Women's Rights to Property Act*, 1937.[2] While the Government in the United Provinces immediately promulgated the necessary legislation to make the law uniform for the devolution of agricultural as well as non-agricultural property the Madras Government declined to take any action.

1. *See* (1941) 2 M. L J. (Jour.) p. 37.
2. (1941) 2 M.L.J. 12.

The definition of the term "Hindu" in S. 2 (1) (*e*) requires clarification. It is arguable that since any person who if the Act were not in force would be governed in matters of intestate succession by the Hindu law is included within the purview of that term under the definition as given in the Bill, communities who though converts to an alien faith still continue to retain the principles of Hindu law in some respects and in some places, would come within the scope of the proposed legislation. It is equally possible to argue on the other hand that since the Hindu law of succession applies to such communities only by way of *custom* it is only the principles of such law as they stood at the time of their conversion that would apply to them and not the changes ushered in subsequently by legislation in the country, unless it be by express enactment. It is therefore desirable to add to S. 2 (1) (*e*) at its end the words "but not one to whom such law applies by way of custom only".

S. 2 (1) (*b*) states that cognates are those between whom there is blood relationship but not wholly through males. This would seem to imply that there must be at least one male link between the parties. If that is correct, a son born of a woman's second marriage cannot inherit as a cognate to his brother born of his mother's first marriage and *vice versa*. Nor can he under the Act inherit in any other capacity. He is certainly not an agnate, nor is he in the list of enumerated heirs, the word "brother" therein being evidently applicable only to the full brother and a half brother sprung from the same father. Since widow remarriages are statutorily permitted and not infrequently practised such cases are likely to occur. In fact in *Ekoba v Kashiram*[1] the Bombay High Court seems to have recognised his heritable capacity. The definition of cognates will have to be amended to provide for such cases. In S. 2 (1) (*b*) after the word "wholly", the words "or otherwise" may be added.

In S. 2 (1) (*i*) defining stridhana after the words "or by gift" the words "from a relative or stranger before, at or after her marriage" are superfluous and hence may be deleted.

The placing of the divided son on a par with the undivided son [S. 2 (1) (*h*) and S. 7 (*b*)] is not justifiable. It does not accord with reason that he who deliberately cuts himself off should rank equally with one who prefers to sail with the family. The rule will also do injustice to the afterborn son. It is hard that he should have to share the patrimony with the divided son in spite of the latter having already had a share.

It is not clear whether the son and grandson of an existing son are intended to be affected. There is no reason for the abrogation of the existing rule that a person inheriting property from his father, grand-father or great grand-father will hold it as ancestral property with reference to his own descendants. The rule may therefore be allowed to remain.

The rule as to legitimate kinship alone giving rise to heritable capacity [S. 2 (*f*)] will produce anomalous results if strictly applied. There is no meaning in applying it to succession to the

1. (1921) I. L. R. 46 Bom. 716.

property of degraded women and dancing girls. The position should therefore be reconsidered.

The *dwyamushyayana son* is given rights in both the families. But there is no reason for giving his descendants the same rights. It should be made clear that they will have rights only in the family of their father's birth.

The rules of preference of the "enumerated" heirs to the other classes and of the agnates to the cognates will mean that an heir like the son's daughter's son will be superseded for instance by the mother's sister's son who is accorded a place among the "enumerated" heirs. This is altogether wrong. Considerations of natural affection, sentiment and spiritual benefit all point the other way. It is anomalous that the father's daughter's son (sister's son) should be accommodated in class II of the "enumerated" heirs while persons like one's own son's daughter's son, son's daughter's daughter, daughter's son's son, daughter's son's daughter, daughter's daughter's son, etc., whose positions if any are *a fortiori* should be left to linger among agnates. In the notes on Cl. 5 the matter is alluded to. It is stated: "If they are to be included —and there are many who think they ought to be—they should come in the above order immediately after the daughter's daughter in class I". It is but just that class I of the "enumerated" heirs is enlarged so as to admit these heirs.

There seems to be no justification for excluding the father's sister, father's father's sister and mother's sister from the list of "enumerated" heirs. The original draft proposals had recognised their right to be in that category. Classes III, IV and V of the "enumerated" heirs will have to be revised so as to admit all these heirs. It is also desirable that the heirs in Class V should be given priority over those in Class IV and the Classes re-arranged.

There is no meaning in retaining the rule in S. 10 as to succession by preceptor, fellow-student etc., in the present condition of Hindu society. The rule is vague, and cases involving its application are rare. It requires considerable clarification as to who an acharya or disciple is, for the rule to be workable.

Special rules as to mutts should be reserved. Words like 'in the same hermitage' in S. 11 (3) would seem to be an anachronism and positively misleading.

The supersession of the son by the daughter in the matter of stridhana succession is no longer justified and ought not to be continued. With the concession to the daughter of rights of succession to the paternal property even in the presence of the son, the reason for according preference to her in stridhana succession has ceased to exist. S. 13 (*b*) may therefore be amended and in entry 1 the words " son, son's son, son's son's son" may be added after the word "daughter" and the numbering of the other entries may be revised.

The special rule regarding the devolution of property inherited by a widow from her husband as distinguished from her other stridhana property [S. 13 (*a*)] is presumably due to the fact that she is not an "agnate" of her husband but a recruit in his family. If that be so, the same reason will equally hold good in

regard to property inherited by a woman from a son or grandson. If there is to be a departure from the normal rules of succession, it should rest on a rational basis and not be arbitrary.

L.A. BILL No. 26 OF 1942.

A Bill to amend and codify the Hindu Law relating to intestate succession.

WHEREAS it is expedient to amend and codify, in successive stages, the whole of the Hindu Law now in force in British India;

AND WHEREAS it is expedient first to amend and codify the general law of intestate succession;

It is hereby enacted as follows:—

PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called THE HINDU CODE, PART I (INTESTATE SUCCESSION).

(2) It extends to the whole of British India.

(3) It shall come into force on the 1st day of January, 1946.

Definitions and interpretation.

2. (1) In this Act, unless there is anything repugnant in the subject or context,—

(*a*) one person is said to be an "agnate" (*gotraja*) of another, if the two are related by blood wholly through males;

(*b*) one person is said to be a "cognate" (*bandhu*) of another, if the two are related by blood, but not wholly through males;

(*c*) "heir" means any person, male or female, who is entitled to succeed to the property of an intestate under this Act;

(*d*) "heritable property" means property which belongs to an intestate in his or her own right and passes by inheritance as distinct from survivorship;

Illustration.

All property of a Hindu governed by the Dayabhaga School of Hindu Law is heritable property as it passes by inheritance and not by survivorship; so too is the self-acquired property of a Hindu governed by any Mitakshara School of Hindu Law, as such property also passes by inheritance and not by survivorship.

(*e*) "Hindu" includes any person who, if this Act were not in force, would be governed in matters of intestate succession by the Hindu Law;

(*f*) "related" means related by legitimate kinship, and any word expressing relationship or denoting a relative shall be construed accordingly;

(*g*) two persons are said to be related to each other by the "full blood" when they are descended from a common ancestor by the same wife, and by the "half blood" when they are descended from a common ancestor by different wives;

(*h*) "son" includes a *dattaka* son, *dwyamushyayana* son and *kritrima* son, but not a *dasiputra*; and *dattaka* son, *dwyamushyayana* son, *kritrima* son and *dasiputra* have the same meanings as in the Hindu Law;

(*i*) "*stridhana*" means property acquired by a woman by inheritance or devise, or at a partition, or in lieu of maintenance, or by gift from a relative or stranger before, at, or after her marriage, or by her own skill or exertions, or by purchase, or by prescription, or by any other mode whatsoever.

(2) In this Act, unless there is anything repugnant in the subject or context, words importing the masculine gender shall not be taken to include females, and for the purposes of this Act,—

(*a*) a person is deemed to die intestate in respect of all property of which he or she has not made a testamentary disposition capable of taking effect;

(*b*) a woman shall be deemed to be an agnate of her father and his agnates, and shall not, by reason only of her marriage, be deemed to be an agnate of her husband or his agnates;

(*c*) the domicile of a Hindu shall be determined in accordance with the provisions contained in sections 6 to 18, both inclusive, of the Indian Succession Act, 1925;

(*d*) when an adoption takes place,—

(*i*) in the case of a *dattaka* son, the natural tie is severed and is replaced by the tie created by the adoption;

(*ii*) in the case of a *dwyamushyayana* son, the natural tie continues side by side with the tie created by the adoption;

(*iii*) in the case of a *kritrima* son, the natural tie continues, while the tie created by the adoption is limited to the person adopted and the person or persons adopting him.

Illustration.

A adopts *C*, son of *B*. *C* has a son, *D*, born to him after the adoption. Then, for the purposes of inheritance, the following consequences will result, depending upon whether *C* was adopted as a *dattaka, dwyamushyayana* or *kritrima* son of *A*.

If *C* was adopted as a *dattaka* son, he becomes the son of *A* and ceases to be the son of *B*. He also becomes the grandson of *A's* father and the nephew of *A's* brother, and so on. He ceases to be the grandson of *B's* father and the nephew of *B's* brother. Likewise, *D* becomes the grandson of *A* but not of *B*.

If *C* was adopted as a *dwyamushyayana* son, he becomes the son of *A*, but continues to be the son of *B* as well. He also becomes the grandson of *A's* father and the nephew of *A's* brother, but continues as well to be the grandson of *B's* father and the nephew of *B's* brother. Likewise, *D* becomes the grandson of *A*, and of *B* as well.

If *C* was adopted as a *kritrima* son, he becomes the son of *A* while continuing to be the son of *B* as well. He does not, however, become the grandson of *A's* father or the nephew of *A's* brother, but remains the grandson of *B's* father and the nephew of *B's* brother *D* on birth becomes the grandson of *B* and not of *A*.

Application of Act.

3. This Act regulates the succession to the heritable property of a Hindu, other than one governed by the Marumakkattayam, Aliyasantana or Nambudiri law of inheritance, dying intestate after the commencement of this Act, in the following cases, namely:—

(*a*) where the property is movable property, unless it is proved that the intestate was not domiciled in British India at the time of death;

(*b*) where the property is immovable property situated in British India, whether at the time of death the intestate was domiciled in British India or not:

Provided that this Act shall not apply—

(*i*) to agricultural land; or

(*ii*) to any estate which descends to a single heir by a customary or other rule of succession or by the terms of any grant or enactment:

Provided further that upon the death of any woman who at the commencement of this Act had the limited estate known as the Hindu woman's estate in any heritable property, such property shall devolve on the persons who would under this Act have been the heirs of the last full owner thereof if he had died intestate immediately after her.

Succession to the property of males.

Devolution of heritable property of males.

4. The heritable property of a male intestate shall devolve according to the rules laid down in this Act—

(*a*) upon the enumerated heirs referred to in section 5, if any;

(*b*) if there is no enumerated heir, upon his agnates, if any;

(*c*) if there is no agnate, upon his cognates, if any;

(*d*) if there is no cognate, upon the heirs referred to in section 10, if any.

Enumerated heirs.

5. The following relatives of an intestate are his enumerated heirs:—

Class I.—*Widow and descendants*:—

(1) Widow, son, daughter, son of a pre-deceased son, and son of a pre-deceased son of a pre-deceased son (the heirs in this entry being hereinafter in this Act referred to as "simultaneous heirs").

(2) Daughter's son.
(3) Son's daughter.
(4) Daughter's daughter.

Class II.—Mother, father and his descendants:—

(1) Mother.
(2) Father.
(3) Brother.
(4) Brother's son.
(5) Brother's son's son.
(6) Sister.
(7) Sister's son.

Class III.—Father's mother, father's father and his descendants:—

(1) Father's mother.
(2) Father's father.
(3) Father's brother.
(4) Father's brother's son.
(5) Father's brother's son's son.
(6) Father's sister's son.

Class IV.—Father's father's mother, father's father's father and his descendants:—

(1) Father's father's mother.
(2) Father's father's father.
(3) Father's father's brother.
(4) Father's father's brother's son.
(5) Father's father's brother's son's son.
(6) Father's Father's sister's son.

Class V.—Mother's mother, mother's father and his descendants:—

(1) Mother's mother.
(2) Mother's father.
(3) Mother's brother.
(4) Mother's brother's son.
(5) Mother's brother's son's son.
(6) Mother's sister's son.

Order of succession among enumerated heirs.

6. Among the enumerated heirs, those in one Class shall be preferred to those in any succeeding Class; and within each Class, those included in one entry shall be preferred to those included in any succeeding entry, while those included in the same entry shall take together.

Illustrations.

(*i*) The surviving relatives of an intestate are his widow, his mother and his father's father. The widow, who is included in Class I is preferred to the mother who is in Class II and the father's father who is in Class III.

(*ii*) The surviving relatives are two daughters and a son's daughter. The daughters who are included in entry (1) of Class I are preferred to the son's daughter who is in entry (3) of the same Class, and the two daughters take together.

(*iii*) The surviving relatives are a widow, two sons, three daughters, two grandsons by a pre-deceased son and a great-grandson by another pre-deceased son's pre-deceased son. All of them, being enumerated heirs included in entry (1) of Class I, succeed simultaneously, no one excluding the others.

Manner of distribution among simultaneous heirs.

7. The distribution of an intestate's property among the simultaneous heirs in entry (1) of Class I shall take place according to the following rules, namely:—

(*a*) The intestate's widow or if there is more than one widow, all the widows together, shall take one share.

(*b*) Each son of the intestate shall take one share, whether he was undivided or divided from, or re-united with, the intestate.

(*c*) Sons, sons of pre-deceased sons, and sons of pre-deceased sons of pre-deceased sons, shall take *per stirpes,* that is to say, the sons of a pre-deceased son shall take the share which would have been taken by him if he had been alive at the time of the intestate's death; and likewise the grandsons of a pre-deceased son shall take the share which their father would have taken if he had been alive at the time aforesaid.

(*d*) Each of the intestate's daughters shall take half a share, whether she is unmarried, married or a widow; rich or poor; and with or without issue or possibility of issue.

Illustrations.

(*i*) The surviving relatives of an intestate are three sons, five grandsons by a pre-deceased son, and two great-grandsons by a pre-deceased son of another pre-deceased son. Each son takes 1|5th of the heritable estates, each grandson 1|25th, and each great-grandson 1|10th.

(*ii*) Only a widow or daughter, and no other simultaneous heir, survives an intestate. The widow or daughter, as the case may be, takes the whole of the heritable estate.

(*iii*) The surviving relatives of an intestate are two widows, a divided son, two undivided sons, an unmarried daughter, two married daughters, a widowed daughter, and four grandsons by a pre-deceased son. The two widows together take one share, each of the three sons takes one share, each of the four daughters takes half a share, and the four grandsons together take one share. Thus, each widow takes 1|14th of the heritable estate, each son 1|7th, each daughter 1|14th, and each grandson 1|28th.

Order of succession among non-enumerated heirs.

8. (1) The order of succession among agnates and cognates, other than enumerated heirs, shall be determined by applying the Rules of Preference in section 9.

(2) For the purpose of applying the said Rules, relationship shall be reckoned from the intestate to the heir in terms of degrees of ascent, or degrees of descent, or both, as the case may be.

(3) Degrees of ascent and degrees of descent shall be computed in the manner indicated in the illustrations below:—

Illustrations.

(*i*) The heir to be considered is the father's mother's father of the intestate. He has no degrees of descent but three degrees of ascent represented, in order, by (1) the intestate's father, (2) that father's mother, and (3) her father (the heir).

(*ii*) The heir to be considered is the father's mother's father's mother of the intestate. She has no degrees of descent, but four degrees of ascent represented, in order, by (1) the intestate's father, (2) that father's mother, (3) her father, and (4) his mother (the heir).

(*iii*) The heir to be considered is the son's daughter's son's daughter of the intestate. She has no degrees of ascent but four degrees of descent represented, in order, by (1) the intestate's son, (2) that son's daughter, (3) her son, and (4) his daughter (the heir).

(iv) The heir to be considered is the mother's father's father's daughter's son of the intestate. He has three degrees of ascent represented, in order, by (1) the intestate's mother, (2) her father, and (3) that father's father, and two degrees of descent represented in order, by (1) the daughter of the common ancestor, *viz.,* the mother's father's father and (2) her son (the heir).

Rules of Preference. 9. The Rules of Preference referred to in section 8 are as follows:—

Rule 1.—Of two heirs the one who has fewer or no degrees of ascent is preferred.

Rule 2.—Where the number of degrees of ascent is the same or none, that heir is preferred who has fewer or no degrees of descent.

Rule 3.—Where the number of degrees of descent is also the same or none, the heir who is in the male line is preferred to the heir who is in the female line at the first point (counting from the intestate to the heir) where the lines of the two heirs can be so distinguished.

Rule 4.—Where neither heir is entitled to be preferred to the other under the foregoing Rules, they take together.

Illustrations.

In the following illustrations, the letters F and M stand respectively for the father and the mother in that portion of the line which ascends from the intestate to the common ancestor and the letters *S* and *D* for the son and the daughter respectively in that portion of the line which descends from the common ancestor to the heir. Thus MFSS stands for the intestate's mother's father's son's son (mother's brother's son), and FDS for the intestate's father's daughter's son (sister's son).

(*i*) The competing heirs are (1) FFSD (father's brother's daughter) and (2) FDDS (sister's daughter's son). Although No. (2) is descended from a nearer ancestor yet, as No. (1) is an agnate while No. (2) is only a cognate, No. (1) is preferred to No. (2).

(*ii*) The competing heirs are (1) SDSS (Son's daughter's son's son) and (2) FDDS (sister's daughter's son). No. (1) who has no degree of ascent is preferred to No. (2) who has one degree of ascent.

(*iii*) The competing heirs are (1) FDDD (sister's daughter's daughter) and (2) MFSD (maternal uncle's daughter). The former who has one degree of ascent is preferred to the latter who has two such degrees.

(*iv*) The competing heirs are (1) FDSSS (sister's son's son's son) and (2) MFSSD (maternal uncle's son's daughter). The former who has only one degree of ascent is preferred to the latter who has two such degrees.

(*v*) The competing heirs are (1) MFDSS (mother's sister's son's son) and (2) MFFDS (mother's father's sister's son). The former who has two degrees of ascent is preferred to the latter who has three such degrees.

(*vi*) The competing heirs are (1) MFM (mother's father's mother) and (2) FFFDSS (father's father's sister's son's son). The number of degrees of ascent in both cases is the same, *viz.*, three, but the former has no degree of descent while the latter has three such degrees. The former is therefore preferred.

(*vii*) The competing heirs are (1) FMF (father's mother's father) and (2) MFF (mother's father's father). The number of degrees of ascent in both cases is the same and there are no degrees of descent. The lines of the two heirs diverge at the very first point, No. (1) being in the male line and No. (2) in the female line. No. (1) is preferred to No. (2).

(*viii*) The competing heirs are (1) FDSS (sister's son's son) and (2) FDDS (sister's daughter's son). The heirs are equally near both in ascent and descent. The dissimilarity in the lines occurs at the third point. At this point No. (1) is in the male line and No. (2) in the female line. No. (1) is therefore preferred.

(*ix*) The competing heirs are (1) FMFSS (father's mother's brother's son) and (2) FMFDS (father's mother's sister's son). The former is preferred.

(*x*) The competing heirs are (1) FDDS (sister's daughter's son) and (2) FDDD (sister's daughter's daughter). The former is preferred.

(*xi*) The competing heirs are a daughter's daughter's son of one sister (FDDDS) and a daughter's daughter's son of another sister (FDDDS). Both of them take the estate in equal shares.

10. If there is no cognate entitled to succeed under section 4, the heritable property of the intestate shall devolve, in the first instance, upon his preceptor (*acharya*); if there is no preceptor, upon the intestate's disciple (*sishya*); and if there is no disciple, upon the intestate's fellow-student (*sa-brahmachari*).

Heirs not related by blood.

11. (1) Where a person completely and finally renounces the world by becoming a hermit (*vanaprastha*), an ascetic (*yati* or *sanyasi*), or a perpetual religious student (*naisthika brahmachari*), his property shall devolve upon his heirs, in the same order and according to the same rules as would have applied if he had died intestate in respect thereof at the time of such renunciation.

Rules for hermits, etc.

(2) Any person who has so renounced the world shall not inherit to any relative of his, by blood or marriage, but the inheritance shall, in such a case, pass to the heir who is next in the order of succession.

(3) Any property acquired by such a person after his renunciation shall, on his death, devolve, not upon his relatives by blood or marriage, but as follows:—

(*a*) in the case of a hermit, upon a spiritual brother belonging to the same hermitage (*dharmabhratraikatirthi*);

(*b*) in the case of an ascetic, upon his virtuous disciple (*sacchishya*);

(*c*) in the case of a perpetual religious student, upon his preceptor (*acharya*).

Stridhana.

12. A woman shall have the same rights over her *stridhana*, including the right to dispose of it by transfer *inter vivos* or by will, as a man has over property acquired by him in the like manner, that is to say, a woman's rights over her *stridhana* shall not be deemed to be restricted in any respect whatsoever, by reason only of her sex.

Right of women over *stridhana*.

Order of succession to *stridhana*.

13. The *stridhana* of a woman dying intestate, in so far as it consists of heritable property, shall devolve as follows:—

(*a*) Property inherited by her from her husband shall devolve upon his heirs, in the same order and according to the same rules as would have applied if the property had been his and he had died intestate in respect thereof immediately after his wife's death.

Explanation.—For the purposes of this clause, property devolving on another widow of the husband, whether under this clause or under entry (9) in clause (*b*), shall be deemed to be property inherited by such widow from her husband.

(*b*) Other property shall devolve upon the following relatives of the intestate, in the order mentioned, namely:—

(1) Daughter;
(2) Daughter's daughter;
(3) Daughter's son;
(4) Son;
(5) Son's son;
(6) Son's daughter;
(7) Husband;
(8) Husband's heirs, in the same order and according to the same rules as would have applied if the property had been his and he had died intestate in respect thereof immediately after his wife's death;
(9) Mother;
(10) Father;
(11) Father's heirs, in the same order and according to the same rules as would have applied if the property had been his and he had died intestate in respect thereof immediately after his daughter's death;
(12) Mother's heirs, in the same order and according to the same rules as would have applied if the property had been hers and she had died intestate in respect thereof immediately after her daughter's death.

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(*c*) Where of two or more heirs of the intestate, no one is entitled to be preferred to any other under the provisions of this section, they shall take together.

Stirpital succession to *stridhana* in certain cases.

14. If the *stridhana* of a woman devolves on two or more of the following relatives, namely, daughters' daughters, daughters' sons, sons' sons and sons' daughters, they shall take it *per stirpes* and not *per capita*.

Illustration.

The surviving relatives of a woman are four grand-daughters by one daughter, *A*, and three grand-daughters by another daughter, *B*. Each of *A's* daughters takes 1|8th of the property and each of *B's* daughters takes 1|6th.

General Provisions.

Full blood preferred to half blood.

15. Heirs related to an intestate by the full blood shall be preferred to heirs related by the half blood, if the nature of the relationship is the same in every other respect.

Illustrations.

(*i*) *A* brother by the full blood is preferred to a brother by the half blood; but a brother by the half blood succeeds before a brother's son by the full blood, a brother being a nearer heir than a brother's son.

(*ii*) *A* paternal uncle by the half blood is preferred to a paternal uncle's son by the full blood, an uncle being a nearer heir than an uncle's son.

(*iii*) A full brother's daughter's daughter is preferred to a half brother's daughter's daughter; but the former is not preferred to a half brother's daughter's son, as the nature of the relationship is not the same in the two cases. The latter, who is a nearer heir by virtue of Rule 3 in section 9, is preferred though he is only of the half blood.

Right of child in womb.

16. A person who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born before the death of the intestate.

Rights of surviving spouse and descendants of a valid marriage.

17. The surviving spouse and descendants of a valid marriage contracted by a male or female Hindu outside his or her caste shall, for all the purposes of this Act, be treated in like manner as the surviving spouse and descendants of a valid marriage contracted within his or her own caste.

Disqualification of widow who was unchaste during husband's lifetime.

18. If an intestate's widow has been unchaste during his lifetime and after her marriage, she shall, unless the unchastity has been condoned by her husband, be disqualified from succeeding to his heritable property, and it shall devolve on his other heirs as it would in her absence:

Provided that the right of a widow to inherit to her husband shall not be questioned on the ground aforesaid, unless—

(*a*) the husband has deprived her of any portion of his property on that ground by a valid testamentary disposition subsisting at the date of his death; or

(*b*) a Court of Law has found her to have been unchaste as aforesaid in a proceeding to which she and her husband were parties and in which the matter was specifically in issue, the finding of the Court not having been subsequently reversed.

Murderer disqualified.

19. A person who commits murder or abets the commission of murder in furtherance of his or her succession to any property shall be disqualified from inheriting such property; and the inheritance shall, in such a case, pass to the heir who is next in the order of succession.

Disease, defect, etc., not to disqualify.

20. No person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity or, save as provided in sub-section (2) of section 11 and sections 18 and 19, on any other ground whatsoever.

Mode of succession of two or more heirs.

21. If two or more heirs succeed together to the property of any intestate, they shall take the property—

(*a*) save as otherwise expressly provided in this Act, *per capita* and not *per stirpes*; and

(*b*) as tenants in common, and not as joint tenants.

Escheat.

22. If the intestate has left no heir, or no heir qualified to succeed to his or her heritable property, such property shall go to the Crown.

Repeals.

23. The enactments specified in the Schedule are hereby repealed to the extent mentioned in the fourth column thereof.

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THE SCHEDULE.

(*See* section 23.)

Year. (1)	Number. (2)	Short title. (3)	Extent of repeal. (4)
1928	XII ..	The Hindu Inheritance (Removal of Disabilities) Act, 1928.	The whole.
1929	II ..	The Hindu Law of Inheritance (Amendment) Act, 1929.	Do.
1937	XVIII ..	The Hindu Women's Rights to Property Act, 1937.	Section 3, sub-section (1).

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THE HINDU LAW OF MARRIAGE BILL.
(L.A. BILL NO. 27 OF 1942.)

LP2345.

The Bill proposes a number of radical alterations in the existing Hindu law relating to marriage. All of them are interesting though some of them are controversial. Monogamy is made obligatory. Bigamy is made punishable. Marriages may be sacramental or civil. The former can take place only between two Hindus. The latter may be between a Hindu and a Hindu, Buddhist, Sikh or Jain. If the bride has not completed her sixteenth year the consent of her guardian in marriage will be essential for a sacramental marriage. The conditions of a civil marriage run on the same lines as those now found in the Special Marriage Act. A sacramental marriage when once completed shall not be deemed invalid by reason only of non-identity of caste or identity of gotra or pravara between the parties.

The Bill does not provide for divorce, in the case of sacramental marriages. Conservative thought stands re-assured. The way is however open to those who do not subscribe to the theory of marriage being a lifelong and indissoluble union to contract a civil

marriage. The rather anomalous result under the existing law that if a Hindu as such contracted a civil marriage with another Hindu he would cease to be governed by Hindu law in matters of succession but would come within the purview of the Indian Succession Act, is avoided by the dropping of the provisions of S. 24 of the Special Marriage Act, in the Bill.

The rules in S. 4 (*b*) and (*c*) requiring identity of caste and difference in gotra and pravara between the parties as *conditions* of a sacramental marriage are practically subverted by the provisions of S. 7 that when once a sacramental marriage is completed it shall not be deemed to be invalid merely by reason of the violation of any or all of these conditions. If S. 7 is to stand S. 4 (*b*) and (*c*) will be superfluous. Pratiloma marriages have always been regarded as void and anuloma marriages where they are allowed really rest on custom. If parties belonging to different castes desire to marry they can contract a civil marriage, particularly as they would still be governed by Hindu law under the proposed state of affairs; or, they can marry under any caste custom permitting such alliances, such a custom being expressly saved by S. 6. Similarly as regards alliances within the gotra or pravara, there again resort may be had to a civil marriage. Relief may no doubt be needed where a sacramental marriage has through mistake, inadvertence or recklessness taken place between Hindus of the same gotra or pravara. In such a case there is no marriage at all according to the Shastras and it may suffice if the parties are permitted to regularise the matter by going through a civil marriage. To deem a marriage to be a sacramental marriage in spite of the violation of some of its fundamentals will be to make a travesty of it.

S. 4 (*e*) seems to be unnecessary. A valid sacramental marriage under the existing law takes place only with the consent of the guardian in marriage of the girl. Where for some reason the principle has not been observed or violated the Courts have always applied the principle of *factum valet* and declined to set aside the marriage unless there has been force or fraud. Again why select sixteen years as the limit? Is it that on completion of the sixteenth year a girl is sure to have attained her years of discretion? That surely must depend on the facts of each case. Or is it by way of accepting the Hindu law age of majority for acting in the matter of marriage, etc.? If at all any limit below eighteen is needed why not fix it at fourteen, the age on completion of which a girl ceases to be a *child* under the Sarda Act?

In the case of marriages outside the caste the consent of the guardian should be made a condition precedent if the bride is below twenty-one years of age, whether the marriage is sacramental or civil. Even under the Special Marriage Act the consent of the guardian is essential if the bride is under that age.

The rule as to monogamy is no doubt desirable. But a rigid enforcement may cause great hardship. For instance in the case of a woman afflicted with a loathsome and hideous disease, the husband will be barred from taking a second wife where the marriage is sacramental, even if the first wife is willing. The

same result will ensue even if the marriage is civil unless resort is had to the tortuous path of divorce which neither of the spouses may desire and which can be had only for one of the causes specified in the Divorce Act leaving the woman utterly adrift. It is desirable therefore that the rule as to monogamy should be relaxed in suitable cases.

The Bill prohibits marriage between uncle and niece. S. 6 does not save any custom to the contrary. It should be made clear that the prohibition will not invalidate any such marriage which has already taken place in pursuance of a caste custom and will govern only marriages taking place in future.

L.A. BILL No. 27 OF 1942.

A Bill to codify the Hindu Law relating to marriage.

WHEREAS it is expedient to amend and codify, in successive stages the whole of the Hindu Law now in force in British India;

AND WHEREAS it is now expedient in pursuance of that design to enact a law of marriage for Hindus;

It is hereby enacted as follows:—

PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called THE HINDU CODE, PART II (MARRIAGE).

(2) It extends to the whole of British India.

(3) It shall come into force on the 1st day of January, 1946.

Interpretation.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "caste" means one of the four primary *varnas* or castes into which Hindus are divided and does not include any sub-caste;

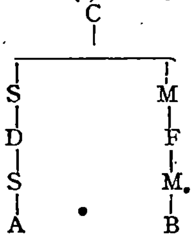
(*b*) "*gotra*" and "*pravara*" have the same meanings as in the Hindu Law;

(*c*) (*i*) "*Sapinda* relationship" with reference to any person extends as far as the fifth generation (inclusive) in the line of ascent through the mother and the seventh (inclusive) in the line of ascent through the father, the line being traced upwards in each case from the person concerned, who is to be counted as the first generation;

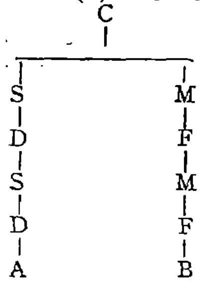
(*ii*) two persons are said to be "*sapindas*" of each other if one is an ancestor of the other within the limits of *sapinda* relationship, or if they have a common ancestor who is within the limits of *sapinda* relationship with reference to each of them;

Illustrations.

(*i*) *A* is the son's daughter's son's daughter of *C*, who is the mother's father's mother's father of *B*. Here *C*, the common ancestor, is the fifth generation from *A* in the father's line and the fifth generation from *B* in the mother's line. *A* and *B* are *sapindas* of each other.



(*ii*) *A* is the son's daughter's son's daughter's daughter of *C*, who is the father's mother's father's mother's father of *B*. Here *C*, the common ancestor, is the sixth generation from *A* in the mother's line and the sixth from *B* in the father's line. *C* being outside the limits of *sapinda* relationship with reference to *A*. *A* and *B* are not *sapindas* of each other.



(*d*) two persons are said to be within "the degrees of relationship prohibited by this Act," if they are related by blood to each other lineally, or as brother and sister, or as uncle and niece, or as aunt and nephew.

Explanation.—For the purposes of clauses (*c*) and (*d*) relationship includes—

(*i*) relationship of the half blood, that is, descent from a common ancestor by different wives, as well as of the full blood, that is, descent from a common ancestor by the same wife;

(*ii*) illegitimate blood relationship as well as legitimate;

(*iii*) relationship in the family of adoption as well as in the family of birth;

and all terms of relationship shall be construed accordingly.

Two forms of Hindu Marriage.

3. There shall be two forms of the Hindu marriage, namely:—

(*a*) a sacramental marriage;

(*b*) a civil marriage.

Sacramental Marriages.

Requisites of a sacramental marriage.

4. A sacramental marriage may be solemnized between any two Hindus upon the following conditions, namely:—

(*a*) neither party must have a husband or wife living at the time of marriage;

(*b*) both the parties must belong to the same caste;

(*c*) if the parties are members of a caste having *gotras* and *pravaras*, they must not belong to the same *gotra*, or have a common *pravara*;

(*d*) the parties must not be *sapindas* of each other;

(*e*) if the bride has not completed her sixteenth year, her guardian in marriage must consent to the marriage.

Ceremonies essential for sacramental marriage.

5. Two ceremonies are essential to the validity of a sacramental marriage, namely:—

(*a*) invocation before the sacred fire;

(*b*) *saptapadi*, that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire.

The marriage becomes complete and binding when the seventh step is taken, and consummation is not necessary to complete a marriage or make it binding on the parties.

Marriages according to custom deemed to be valid sacramental marriages.

6. Notwithstanding anything contained in sections 4 and 5, a marriage shall be deemed to be a valid sacramental marriage if it is solemnized in accordance with the customs or usages of any locality or community to which both the parties belong, or the rules of any school of personal law which they both follow, whether such community be a caste, sub-caste, sect, tribe, or other group:

Provided that the condition specified in clause (*a*) of section 4 is fulfilled and that the parties are not within the degrees of relationship prohibited by this Act.

Sacramental marriages not to be deemed to be invalid in certain cases.

7. No sacramental marriage solemnized after the commencement of this Act shall, after it has been completed, be deemed to be, or ever to have been, invalid merely by reason of one or more of the following causes, namely:—

(*a*) that the parties to the marriage do not, or did not, belong to the same caste;

(*b*) that the parties belonged to the same *gotra* or had a common *pravara*; or

(*c*) unless there was force or fraud, that the consent of the bride's guardian in marriage to the marriage was not obtained.

Civil Marriages.

Requisites of a civil marriage.

8. A civil marriage may be contracted under this Act by any person professing the Hindu religion with any other person professing the Hindu, Buddhist, Sikh, or Jaina religion upon the following conditions, namely:—

(1) neither party must, at the time of the marriage, have a husband or wife living;

(2) the man must have completed his eighteenth year, and the woman her fourteenth year, according to the Gregorian calendar;

(3) each party must, if he or she has not completed his or her twenty-first year, have obtained the consent of his or her guardian in marriage to the marriage;

(4) the parties must not be within the degrees of relationship prohibited by this Act.

Marriage Registrars.

9. (1) The Provincial Government may appoint one or more Registrars under this Act for any portion of the Province.

(2) The officer so appointed shall be called "Registrar of Hindu Civil Marriages" and is hereinafter referred to as "the Registrar".

(3) The portion of territory for which any such officer is appointed is hereinafter referred to as his district.

Notice of marriage to Registrar.

10. (1) When a civil marriage is intended to be contracted under this Act, one of the parties must give notice in writing to the Registrar before whom it is to be contracted.

(2) The Registrar to whom such notice is given must be the Registrar of a district within which one at least of the parties to the marriage has resided for fourteen days before such notice is given.

(3) Such notice may be in the form given in the First Schedule.

Marriages Notice Book.

11. The Registrar shall file all notices given under sub-section (1) of section 10 and keep them with the records of his office, and shall also forthwith enter a true copy of every such notice in a book furnished to him for that purpose by the Provincial Government, to be called the "Hindu Civil Marriages Notice Book," and such book shall be open at all reasonable times, without fee, to all persons desirous of inspecting the same.

Objection to marriage.

12. (1) Fourteen days after notice of an intended marriage has been given under section 10 such marriage may be contracted, unless it has been previously objected to in the manner hereinafter provided in this section.

(2) Any person may, before the expiration of fourteen days from the giving of the notice of an intended marriage, object to such marriage on the ground that it would contravene some one or more of the conditions prescribed in clauses (1), (2), (3) and (4) of section 8.

(3) The nature of the objection made shall be recorded in writing by the Registrar in the Hindu Civil Marriages Notice Book and shall, if necessary, be read over and explained to the person making the objection, and shall be signed by him or on his behalf.

Procedure of Registrar on receipt of objection.

13. (1) If an objection is made under section 12 to an intended marriage the Registrar shall not allow the marriage to be contracted until the lapse of fourteen days from the receipt of such objection, if there be a Court of competent jurisdiction open at the time, or, if there be no such Court open at the time, until the lapse of fourteen days from the opening of such Court.

Objector may file suit.

(2) The person objecting to the intended marriage may file a suit in any Civil Court having local jurisdiction (other than a Court of Small Causes) for a declaratory decree, declaring that such marriage would contravene some one or more of the conditions prescribed in clauses (1), (2), (3) and (4) of section 8, and the officer before whom such suit is filed shall thereupon give the person presenting it a certificate to the effect that such suit has been filed.

Certificate of filing of suit to be lodged with Registrar.

(3) If the certificate referred to in sub-section (2) is lodged with the Registrar within fourteen days from the receipt by him of the objection, if there is a Court of competent jurisdiction open at the time, or, if there is no such Court open at the time, within fourteen days of the opening of such Court, the marriage shall not be contracted till the decision of such Court has been given and the period allowed by law for appeals from such decision has elapsed; or, if there is an appeal from such decision, till the decision of the Appellate Court has been given.

(4) If such certificate is not lodged in the manner and within the period laid down in sub-section (3) or if the decision of the Court is that such marriage would not contravene any of the conditions prescribed in clauses (1), (2), (3) and (4) of section 8, such marriage may be contracted.

(5) If the decision of the Court is that the marriage in question would contravene any of the conditions prescribed in clauses (1), (2), (3) and (4) of section 8, the marriage shall not be contracted.

Court may fine when objection not reasonable.

14. Any Court in which any such suit as is referred to in sub-section (2) of section 13 is filed, may, if it appears to it that the objection was not reasonable and *bona fide*, inflict a fine not exceeding one thousand rupees on the person objecting, and award it, or any part of it, to the parties to the intended marriage.

Declaration by parties and witnesses.

15. Before the marriage is contracted the parties and three witnesses shall, in the presence of the Registrar, sign a declaration in the form contained in the Second Schedule. If either party has not completed his or her twenty-first year, the declaration shall also be signed by his or her guardian, except in the case of a widow, and, in every case, it shall be countersigned by the Registrar.

Marriage how to be contracted.

16. The marriage shall be contracted in the presence of the Registrar and of the three witnesses who signed the declaration. The contracting may be done in any form, provided that each party says to the other, in the presence and hearing of the Registrar and witnesses, "I, (*A*), take thee, (*B*), to be my lawful wife (*or* husband)."

Place where marriage may be contracted.

17. The marriage may be contracted either at the office of the Registrar or at such other place, within reasonable distance of the office of the Registrar, as the parties desire:

Provided that the Provincial Government may prescribe the conditions under which marriages may be contracted at places other than the Registrar's office, and the additional fees to be paid thereupon.

Certificate of marriage.

18. (1) When the marriage has been contracted, the Registrar shall enter a certificate thereof in a book to be kept by him for that purpose and to be called the "Hindu Civil Marriages Certificate Book" in the form given in the Third Schedule, and such certificate shall be signed by the parties to the marriage and the three witnesses.

(2) The Hindu Civil Marriages Certificate Book shall at all reasonable times be open for inspection, and shall be admissible as evidence of the truth of the statements therein contained. Certified extracts therefrom shall on application be given by the Registrar on the payment to him by the applicant of such fees as may be prescribed by the Provincial Government.

Transmission of certified copies of entries in marriage certificate book to the Registrar General of Births, Deaths and Marriages.

19. The Registrar shall send to the Registrar General of Births, Deaths and Marriages for the territories within which his district is situate, at such intervals as may be prescribed by the Provincial Government, a true copy certified by him, in such form as the Provincial Government may prescribe, of all entries made by him in the Hindu Civil Marriages Certificate Book since the last of such intervals.

Fees.

20. The Provincial Government shall prescribe the fees to be paid to the Registrar for the duties to be discharged by him under this Act.

The Registrar may, if he thinks fit, demand payment of any such fee before performing any duty in respect of which it is payable.

Indian Divorce Act to apply.

21. The Indian Divorce Act shall apply to all civil marriages contracted under this Act, and any such marriage may be declared null or dissolved in the manner therein provided, and for the causes therein mentioned, or on the ground that it contravenes some one or more of the conditions prescribed in clauses (1), (2), (3) and (4) of section 8 of this Act.

Penalty for signing declarations of certificates containing false statements.

22. Every person making, signing or attesting any declaration or certificate required under this Act, containing a statement which is false, and which he either knows or believes to be false or does not believe to be true, shall be deemed guilty of the offence described in section 199 of the Indian Penal Code.

General Provisions.

Guardianship in marriage.

23. (1) The persons entitled to be guardians in marriage—

(*a*) of a Hindu girl who has not completed her sixteenth year, for the purposes of her sacramental marriage,

(*b*) of a Hindu (other than a widow) who has not completed his or her twenty-first year, for the purposes of his or her civil marriage under this Act,

are the following, in the order given, namely:—

(1) the father;

(2) the mother;

(3) the paternal grandfather;

C

(4) the brother;

(5) any other agnatic male relation;

(6) the maternal grandfather;

(7) the maternal uncle.

(2) Where any person entitled to be the guardian in marriage under sub-section (1) refuses, or is, by reason of absence, desertion, disability or other cause, unable or unfit, to act as such, the person next in order shall be entitled to be the guardian.

(3) Where there are two or more persons equally entitled to guardianship under the foregoing provisions, it shall be in the discretion of the Court having jurisdiction under the Guardians and Wards Act, 1890, to decide which of them shall be regarded as the guardian.

(4) Nothing in this Act shall affect the jurisdiction of a Court to prohibit by injunction an intended marriage arranged by the guardian, if in the interests of the minor the Court thinks fit to do so.

Punishment of bigamy.

24. Any marriage between two persons, one professing the Hindu religion and the other the Hindu, Buddhist, Sikh, or Jaina religion, solemnized or contracted after the commencement of this Act is void, if at the date of such marriage either party had a husband or wife living; and the provisions of sections 494 and 495 of the Indian Penal Code shall apply accordingly.

Power to make rules.

25. The Provincial Government may, by notification in the official Gazette, make rules to regulate any matter which is to be or may be prescribed under this Act.

Enactment amended.

26. The Special Marriage Act, 1872, shall be amended in the manner specified in the Fourth Schedule.

GILLETTE INDUSTRIES, LTD. *v.* BERNSTEIN, (1941) 3 All.E.R. 248 (C.A.).

Patents—Condition against re-sale of article below a fixed price—Breach—Crucial time of knowledge of restrictive condition—Whether time of purchase or of re-sale—Practice—Certificate of validity of patent—When to be given.

In an action to restrain the defendants from selling Gillette blades, manufactured by the plaintiffs under their patents, at less than certain regulated prices,

Held, that the burden lies upon the patentee to show *inter alia* that the defendant had the restrictive condition brought to his notice at the time when he acquired the patented goods and it is not sufficient to show that that condition came to his notice in the interval between his acquisition of the goods and his disposal of them.

Columbia Graphophone Co., Ltd. v. *Thomas,* 41 R.P.C. 294, explained.

Held, further, that the Court should not as a matter of practice or custom grant a certificate of validity of a patent in a case where there has been no effective contest, merely on *prima facie* evidence of validity being given.

BISHOP *v.* BISHOP, (1941) 3 All.E.R. 268.

Divorce—Petition—Rule of practice requiring petitioner to state "whether" there has been any resumption of cohabitation since

the making of order in previous proceedings with reference to the marriage—Duty to state negative fact.

The Matrimonial Clauses Rules, 1937, R. 4 (1) (*f*), provided:—The petition in a matrimonial case . . . shall state . . . (*f*) whether there have been in the High Court or a Court of summary jurisdiction any, and if so what, previous proceedings with reference to the marriage . . . the effect of any decree or order made in such proceedings, and "whether there has been any resumption of cohabitation since the making thereof. . . ." On a construction of the rule, *held*, the word "whether" in the rule clearly means "aye" or "no" and the petition for divorce should plead "whether or not", there has been a resumption of cohabitation as it is desirable that the Court should know precisely the state of affairs between the parties.

MANCINI *v.* DIRECTOR OF PUBLIC PROSECUTIONS, (1941) 3 All.E.R. 272 (H.L.).

Criminal trial—Murder—Prosecution for—Accused setting up self-defence but asking for reduction of crime to manslaughter—Facts disclosing a possible case of manslaughter—Proper summing up to the jury—Duty of Judge.

Although the accused's case at the trial for murder was in substance that he had been compelled to use his weapon in necessary self-defence—a defence which, if it had been accepted by the jury, would have resulted in his complete acquittal—it is the duty of the Judge in summing up to the jury, to deal adequately with any other view of the facts which might reasonably arise out of the evidence given, and which would reduce the crime from murder to manslaughter. The fact that a defending counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defence) does not relieve the Judge from the duty of directing the jury to consider the alternative, if there is material before the jury which would justify a direction that they should consider it. But if the evidence before the jury at the end of the case does not contain material upon which a reasonable man could find a verdict of manslaughter instead of murder, it is no defect in the summing up that manslaughter is not dealt with. Where there is no evidence to raise the issue of provocation it is not the duty of the Judge to invite the jury to speculate as to provocative incidents from the evidence.

Re A DEBTOR (No. 6 of 1934), (1941) 3 All.E.R. 289 (Ch.D.).

Bankruptcy—Order directing bankrupt to pay £5 per month out of his salary "during the bankruptcy" and "until the Court shall make an order to the contrary"—Subsequent order of discharge expressly continuing the order for monthly payment—Validity.

An order was made on March 1, 1938, under S. 51 (1) of the Bankruptcy Act that the sum of £5 monthly should be paid to the trustee out of the bankrupt's salary "during the bankruptcy" and "until the Court shall make an order to the contrary." On March 10,

1938, the Court granted the debtor an immediate discharge but directed that the order under S. 51 (1), dated March 1, 1938, be expressly continued on a special case stated to test the validity of the order continuing the appropriations out of the bankrupt's salary,

Held, that, (1) orders made under S. 51 need not be limited to property vested in the trustee under the other provisions of the Bankruptcy Act. (2) The discharge of a bankrupt does not put an end to the bankruptcy and therefore it cannot be held that the words "during the bankruptcy" refer to a period which comes to an end the moment the bankrupt gets his discharge. (3) In any event what the Court did in effect by the order of March 10 (whether or not it was entirely necessary) was to impose on the discharge of the bankrupt the condition that the order of March 1 should continue in operation. (4) The order of March 10 was therefore valid and effective.

WOOLFALL AND RIMMER, LTD. *v.* MOYLE, (1941) 3 All.E.R. 304 (C.A.).

Insurance—Insurance against liability to workmen—Question in proposal form "Are your machinery, etc., properly fenced and guarded and otherwise in good order and condition?"—If refers to future condition—Condition in policy that assured shall take reasonable precautions to prevent accidents—If discharged by selecting competent foreman—Accident due to negligence of foreman—Effect.

In a proposal for insurance against liability to employees one of the questions asked was "Are your machinery, plant and ways properly fenced and guarded and otherwise in good order and condition"? and the answer was "Yes". In the policy of insurance was *inter alia* a condition that "the assured shall take reasonable precautions to prevent accidents and to comply with all statutory obligations." The insured employed a foreman who was obviously a competent and skilled man. In an action for indemnity under the policy for liability to a workman by an accident due to a defective scaffolding subsequently set up,

Held, (1) The question in the proposal form and the answer thereto merely relate to the moment of time at which the proposer is answering it and does not extend to the future condition of the machinery, plant and ways during the currency of the policy.

(2) By entrusting to a competent foreman the task of providing suitable and safe material for scaffolding and by selecting suitable materials for the job the employers took the reasonable precaution imposed by the condition and the insured are not in breach of the condition if the foreman is in fact negligent in carrying out the task entrusted to him.

R. *v.* HAMMOND, (1941) 3 All.E.R. 318 (C.C.A.).

Criminal Trial—Procedure—Admissibility of evidence—Objection to when to be taken.

The counsel for prosecution in a murder trial had started his opening, had stated a few facts to the jury and was proposing to open to the jury the circumstances in which a complete confession had been made by the accused. When counsel for defence informed him that there would be an objection to the admissibility of the confession, the jury was sent out and the question of admissibility was argued.

Held: The ordinary practice in such a case, if there is any objection on the part of counsel for the defence to the admissibility of a piece of evidence, is that he should inform the prosecution of that fact beforehand, and that the piece of evidence should not be opened to the jury. But in cases like the present where it is convenient and in which it cannot possibly result in any harm in its being done, a Judge can hear advance arguments as to the admissibility of evidence. But in most cases the ordinary rule should be adhered to and it would have been very much better if it had been followed. Counsel for the prosecution could have opened the facts as to the murder and various other matters, medical evidence and so forth, and then simply have told the jury that there was some other vital evidence which he was not in a position to mention to them at the moment, but that it would be tendered in evidence at the proper time and the objection to admissibility could have been taken then and decided.

LAURIE *v.* RAGLAN BUILDING CO., LTD., (1941) 3 All.E.R. 332 (C.A.).

Tort—Negligence—Vehicles skidding and striking a person on pavement—Negligence—Burden of proof.

No vehicle has a right so to manoeuvre itself that its tail or radiator, or whatever it may be, projects over the pavement to the injury of pedestrians lawfully there. The circumstance that the accident was due to a skid is not sufficient to displace the *prima facie* presumption of negligence. The skid by itself is neutral and may or may not be due to negligence. It rests on the defendant to displace the *prima facie* case of negligence by proving that the skid happened without any fault on the part of the driver.

LIVERSIDGE *v.* ANDERSON AND ANOTHER, (1941) 3 All.E.R. 338 (H.L.).

See also GREENE *v.* SECRETARY OF STATE FOR HOME AFFAIRS, (1941) 3 All.E.R. 388 (H.L.).

Defence (General) Regulations (1939)—*Reg.* 18-*B—Imprisonment under—Onus of proof as to the validity of detention order—Claim for particulars of defence—Sustainability.*

Defence (General) Regulations—Reg. 18-B was in the following terms:—

"If the Secretary of State *has reasonable cause* to believe any person to have been or to be a member of or to have been or to be active in the furtherance of the objects of any such organisation as is hereinafter mentioned and that it is necessary to exercise control over him, he may make an order against that person directing that he be detained".

The plaintiff having been detained by an order made by the Home Secretary under the Defence (General) Regulations 1939. Reg. 18-B as a person of hostile association, in an action for damages for false imprisonment raised the validity of the order of detention. The plaintiff sought to have certain particulars from the defendant (the Secretary for Home affairs) of the grounds for belief of existence of reasonable cause which the Courts below refused to order.

Held, (Lord Atkin dissenting) that the words in the regulation. "If the Secretary of State *has reasonable cause,* for the belief" in the context point simply to the belief of the Secretary of State founded on his view of there being reasonable cause for the belief which he entertains and not that there must be an external fact as to reasonable cause capable of being challenged in a Court of law.

The order of the Secretary of State is *prima facie* proof of the validity of the detention and as the onus shifts on to the plaintiff to prove its invalidity the particulars of the grounds of the "reasonable cause" cannot be ordered to be given.

RHODES *v.* SECRETARY OF STATE FOR WAR, (1941) 3 All.E.R. 407 (C.A.).

Compensation (Defence) Act, 1939—*S.* 2 (1) (*d*)—*Dwelling house requisitioned by the military authorities—Compensation—Costs of solicitor engaged for negotiation—If recoverable as costs incurred in complying with the requisition.*

Under the Compensation (Defence) Act, 1939, compensation in respect of land requisitioned by the military may be settled by agreement or in default of agreement by the appropriate tribunal. A person who had engaged a solicitor for negotiating the amount of compensation, claimed the costs incurred as "expenses incurred in complying with the directions" given on behalf of His Majesty—the requisitioning of the land,

Held, though the expenses of a solicitor in connection with making arrangements to comply with directions of the authority would be recoverable as part of the compensation expenses incurred in measuring the compensation for having complied with the directions they are not recoverable as part of the compensation under the terms of the Act.

Re N. V. SCHEEPVEERT AND SOVFRACHT, (1941) 3 All. E. R. 419 (C.A.).

Aliens—Company incorporated and carrying on business in territory since occupied by enemy—If enemy aliens—Right to continue, arbitration proceedings previously started in England—Effect on retainer of solicitor.

The modern rule of international law is that while the occupying power exercises a military authority over the occupied territory, it does not by the mere fact of occupation exercise sovereignty over it. The mere fact that a person or company is continuing to trade within territory (like the Netherlands) occupied by the enemy does not impress that person with the character of an alien enemy

at common law to the extent that British subjects may not lawfully have dealings with him and access to the King's Courts is not denied to him. There may well be cases where the occupying enemy or some or all of the inhabitants of the occupied territory, so act that it may be a fair inference that all the inhabitants or some of them have acquired an enemy character and each case must be decided on the facts available to the Court.

On the facts of the present case the company had not such an enemy character as to exclude it from acting through solicitor in England or from presenting a claim as claimant in an arbitration or from appearing as "actor" in the King's Courts.

Re V. G. M. HOLDINGS, LTD., (1941) 3 All. E. R. 417 (Ch. D.).

Practice—Execution—Stay order—Subsequent variation of the order as to amount of security—No jurisdiction to make after orders passed and entered.

Where on an application for a stay of execution pending an appeal, a judge has exercised his jurisdiction as to the amount of security which should be given and as to the time within which the security should be given and the order as to stay has been passed and entered, the judge is *functus officio* and has no jurisdiction to vary the order. The only remedy to get the order varied is to go to the Court of Appeal.

BUTLER *v.* ALCOCK, (1941) 3 All. E. R. 411 (C.A.).

Insurance—Society given power by rules to institute legal proceedings on behalf of members—Failure to institute proceedings—Society when liable.

A society was established for the definite object of administering on behalf of its members the provisions of the National Health Insurance Act. A rule of the society provided that "The executive committee of the society shall have power to institute legal proceedings on behalf of members of the society in cases where it may deem it advisable so to do, and may direct the institution of any legal or other proceedings or inquiries which it may consider desirable in the interests of the society or its members. A member involved in a road accident suffered severe personal injuries. He claimed in an action against the society that the society had been guilty of negligence, in that it had assumed on his behalf responsibility for taking legal proceedings to recover damages against the other party to the accident—namely a County Council by one of its drivers—and in breach of its duty had omitted to commence those proceedings within the period of six months allowed by the Public Authorities Protection Act, 1893. He claimed that as a result of that delay the chance of obtaining damages was lost to him.

Held, that the rule did not impose on the committee any obligation whatever to institute legal proceedings on behalf of members. It gave the committee power to do so only in cases where it may deem it advisable so to do.

JOTTINGS AND CUTTINGS.

Shakespeare and the Law.—Mr. Justice Bennett delighted listeners in his Court on 2nd December, by devoting part of his judgment in an action for an injunction and damages for breach of contract to produce a popular musical play in its entirety and in a first class manner, to an examination of the literary merits of the lyrics of the play. There had been some expert evidence to the effect that the "continuity of the story" had been destroyed and the "balance of the play" had been upset, but his lordship observed that with all respect to the authors, although the play was highly successful, there was no literary merit in the lyrics, with one exception, which, his lordship said, displayed the touch of a master. It was one which conjured up an early English morning on a summer's day. In it there was not one word that was too much. The lyric began with the words "Hark, hark the lark". It is refreshing to know that the law of England is interpreted and applied in these harsh days by men who are so sincerely appreciative of the fine flower of English literature and who can pause for a minute or two to pay homage to the greatest poet of all time. Shakespeare himself would have appreciated this homage from the bench, for one tradition has it that a fellow native of Stratford-on-Avon procured him employment in a lawyer's office on his arrival in London. Lord Campbell in his "Shakespeare's Legal Acquirements" in 1859 attributes his knowledge of legal matters to his early intercourse with members of the Inns of Court. This seems to be borne out by Tranio's "And do as adversaries do in law, strive mightily but eat and drink as friends" in "The Taming of the Shrew". Perhaps Falstaff's "the rusty curb of old father antick, the law" was written with a memory of Shakespeare's father's litigation. Cloten's lovely song "Hark, hark the lark" from "Cymbeline," deserves all the homage that can be paid to it, and indeed the author himself did not think meanly of it, as he described it as "a wonderful sweet air, with admirable rich words to it".—*S. J.*, 1941, *p.* 463.

Paper Waste.—At the Manchester Assizes Mr. Justice Croom-Johnson condemned waste of paper in pleadings; in one case he had noticed five complete blank sheets and some pages contained nothing but names of counsel. From this point of view it is well that Chancery pleading has so long been pruned of its redundancies. The old "Bill in Chancery" was generally an enormous screed setting out the suitor's wrongs at great length, together with the transgressions committed by the defendants. This Bill was then turned into "interrogatories" to be answered by the defendants on oath, each statement being turned into a searching question; the rough draft was usually prepared by the clerk of junior counsel and the result was often curious. There is a story of a "Cross Bill" filed on behalf of a trustee, sued by a married woman, who had prevailed upon him to allow trust money, which she was restrained from anticipating to be advanced to her husband, ostensibly to save him from bankruptcy. Part of the interrogatories prepared by the clerk went like this: "Did not the defendant fall down on her knees or on one and which of them

and implore the plaintiff with tears in her eyes and in one and which of them to advance the said sum of £—— or some other and what sum to her husband to save him from bankruptcy and their children from ruin or how otherwise?" It is said that one junior once bet another that if a few lines of "Paradise Lost" were interpolated into a Bill his clerk would turn them into interrogatories without flinching. This is what resulted: "Was it man's first or some other and what disobedience, and the fruit of that forbidden or some other and what tree, whose mortal taste brought death into this or some other and what world and all our woe, and if not why not or how otherwise?"—*S. J.*, 1941, *p.* 474.

War Work and the Bench.—According to a report in a Sunday paper His Honour Judge A. C. Caporn, of Wolverhampton County Court, "clocks in" daily at a Midland war factory during his vacation and works as a volunteer hand at the carpenters' bench with secondary school-boys. He is quoted as having expressed his liking for the kind of work which he does at the factory and admitted that he "potters around a bit" at home. Unfatigued by his labours in the county court, His Honour, like the owner of Locksley Hall, may call men his brothers, "men the workers, ever reaping something new; that which they have done the earnest of the things that they shall do." The carpenter's bench is very different from the judicial bench, and it is only by turning the mind to things different from the daily round and common task of judgment summonses, possession cases and workmen's compensation that the perfect recreation for county court judges may be found, and thus, as Browning said "Work grows play, adversity a winning fight". Dryden wrote: "Work is a pleasure, when we choose our task". It is doubly a pleasure when it contributes to the winning of the war, and, according to report His Honour is willing to share his pleasure by forming a "Solicitors' Labour Corps" from the ranks of local lawyers. If solicitors have any spare time in these days of labour scarcity, they could give their service to no better cause. It is doubtful, however, whether many solicitors in active practice will be able to join the corps, but they will certainly feel the benefit of His Honour's new pre-occupation in other ways, and more particularly in having on the bench a judge with first-hand knowledge of factory conditions and work. Judge Caporn's is an inspiring example and may well be copied with advantage by other and higher luminaries of the bench.—*S. J.*, 1942, *p.* 9.

Legal Calendar.—On the 16th February, 1733, there was heard in Doctors Commons a case relating to one Mrs. Lewis, a widow, who had made her will, married again and survived her second husband. This will having been found after her death the question arose whether or not it was void. Counsel contending that it was valid, showed that when Romans who had made their wills and been afterwards taken captives regained their liberty, the force of those wills revived and thence be inferred "that as matrimony was a state of captivity, wills made by unmarried persons, who by surviving their husbands became free, the same ought to revive with their freedom". But the judges rejected

this contention, distinguishing between captivity and matrimony, the former being the effect of compulsion and the latter a voluntary act.—*S. J.*, 1942, *p.* 55.

Presumption of Innocence.—That excellent institution, the Brains Trust, was asked at its broadcasting session on 10th March, whether there was any difference between the practical effects of the English maxim that every person is innocent until he is proved guilty, and that prevailing on the Continent that an accused person is guilty until he is proved to be innocent. The questioner stated that in both cases trial and procedure follow identical lines. After a proper though somewhat unusual silence, it was suggested by way of answer that the presupposition that a man is guilty was one that produced in the mind of the jury a different outlook from that prevailing in the mind of an English jury, and that the question was mainly psychological. Another member said that the barrister had to assume that his client was guiltless if he was to do his best, and the Continental principle did not conduce to that state of mind. Finally, a view was expressed that the facts might not be as stated, and that no further progress could be made on the legal basis. Time then mercifully came to the rescue of the Brains Trust. There can be no doubt of the English rule. Lord Sankey said in *R* v. *Woolmington* (1935) A.C. 462, that throughout the web of the English criminal law one golden thread was always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt. Where there was at the end of the case a reasonable doubt, created either by the evidence for the prosecution or by that of the defence, the prisoner was entitled to an acquittal. The complications of modern life have necessitated the addition to the Statute Book of a number of cases in which the onus is placed on the defendant of proving his innocence with regard to certain facts which lie peculiarly within his own knowledge but these exceptional cases underline and do not negative the general rule. The psychological factor, as the speaker on the Brains Trust said, is by no means to be ignored where juries are concerned, and it may be that any similarity between the procedure abroad and that prevailing in England is only apparent where the trial abroad is before one Judge or a panel of Judges, who may be expected to give every assistance to the prisoner in establishing his innocence.

—*S.J.*, 1942, *p.* 80.

Binding Precedent.—In an interesting article in *The Irish Law Times and Solicitors' Journal* for 4th April, on "Precedents and the Common Law", the writer traces the history of the doctrine of binding precedent as applied in the English Courts. Prior to 1356, he pointed out, the Court records in England were made in Latin, while pleading and practice were effected in the French tongue until as late as 1731. Over 100 years ago, Jeremy Bentham wrote: "Traverse the whole continent of Europe, ransack all the libraries belonging to the jurisprudential system of the several political States, add the contents all together, you would not be able to compose a collection of cases equal in variety, in amplitude, in clearness of statement, in a word, all points taken together, in

instructiveness, to that which may be seen to be afforded by the collection of English Reports of adjudged cases." The doctrine of binding precedent he stated, was only to be found in those jurisprudential systems which were based on English law. A precedent meant, in the words of Sir Frederick Pollock, that "a judgment looks forward as well as backwards. It not only ends the strife between the parties, but lays down the law for similar cases in the future". Precedents, he said, were freely quoted in the eighteenth century, and Blackstone, in the first book of his "Commentaries," published in 1765, pronounced it to be the duty of the presiding Judge to adhere to them. Probably the present doctrine of strict adherence was not fully established until the latter part of the nineteenth century. The writer stated that unless the principles of growth and change are admitted by appellate tribunals it might be that the qualities of expansion and adaptability in our common law would be greatly restricted. He suggested that a single judgment in an appellate Court gave more authority to the pronouncement of the Court than individual judgments. In Ireland, he added, the practice was to follow Irish decisions as far as possible, but reported decisions of the English Courts continued to assist Irish lawyers. Reports of American cases were accepted by the Courts as illustrations of the workings of principles. On the other hand, while decisions of Irish and Scottish Courts were not binding on Courts in England, they were invariably received there with the greatest respect. It is necessary to add that the amount of respect accorded to judgments of courts administering a legal system with a common origin to our own, necessarily varies with the name of the Judge, and even in the confines of our own legal system that principle has been known to apply. In England an admonition to tribunals not to apply precedents too rigidly where the circumstances of society have changed might be considered superfluous having regard to the number of cases in which that has been recognised, notably in the many cases dealing with the subject of restraint of trade. At a time when the liberties guaranteed by the English common law are in peril nothing but good can come from exchanges of views concerning the development of our common heritage.—*S.J.* 1942, *p.* 121.

BOOK REVIEW.

LEGAL RIGHTS OF HINDU WOMEN, by K. B. Gajendragadkar, Pleader, Satara, with a foreword by the Right Hon'ble M. R. Jayakar, published by the Indian Institute of Sociology, Bombay, 1942.

This brochure was meant essentially for the consideration of the Hindu Law Committee. It is aimed at elucidating the true and rational basis of reform in Hindu law towards a just and adequate recognition of the rights of women. The suggestions of the author, though on some points—that divorce should be allowed in cases of extreme hardship in Hindu marriages, that suits for jactitation of marriage should be permitted where either spouse is suffering from inherent incapacity for the purpose of marital duties, that marriages in contravention of the Child Marriage Restraint Act should be made void, that provi-

sion for the registration of marriages like births and deaths should be made, etc.—debatable are generally such as to find acceptance. There are some grmmatical and typographical errors which could have been easily avoided. The appendices, particularly the one giving an outline of the Baroda Government's legislation regarding Hindu law will be found to be highly interesting.

A TEXT-BOOK OF EQUITY, by D. Bose, M.A., B.L., published by G. N. Sarkar, 6-A, Dinabandhu Lane, Calcutta, 1942, 249 pages. Price Rs. 3.

In its framework the book is a second edition of the author's Students' Handbook of Equity published in 1934. The present edition is intended to fulfil the general requirements of a text-book for students. The author has candidly stated that it is essentially "a work of compilation whose novelty lies in its arrangement and mode of presentation". The points have been taken from standard works, judiciously arranged and lucidly set out. There are sixteen chapters of which the first four deal with principles of equity and equitable estates generally, while Chapters V to IX deal with trusts and the other chapters with miscellaneous topics like Satisfaction and Ademption, Conversion, Election, Mortgages, Liens, Equitable Relief in Contracts, etc. The footnotes given are generally helpful. We have great pleasure in welcoming the publication.

CENTURY EDITION OF ALL-INDIA CRIMINAL DIGEST, (1840-1941), Vol. II, by A. N. Khanna, Advocate, Lahore, published by Atma Ram & Sons, Lahore.

This volume covers the case-law bearing on Ss. 240 to 487 of the Code of Criminal Procedure. It fully maintains the high standard set by the first volume and is alive to the dual objective of the author, namely, that it should serve the purpose of a digest and a subject index. The headings and sub-headings adopted are such as to conduce to clarity. The points are intelligently grouped and the matter is set out briefly and yet lucidly. The volume is very well got up and will be highly useful to the members of the legal profession.

THE LAW OF INSURANCE, by Bishan Nath, Advocate, Lahore, second edition, 1942, published by the University Book Agency, Lahore, Price Rs. 5.

This book gives the text of the Insurance Act—Act IV of 1938—as amended by subsequent legislation, as also the rules framed under the Act. Short notes are appended to some of the sections with a brief advertence to case-law, wherever the points are knotty. The synopsis of the Act given at the beginning stating the requirements of the Act for an Insurer and for a Provident Fund Society, Powers and duties of a Superintendent of Insurance, Powers of the Central Government, Rights of a Policy-holder, etc., forms a helpful feature of the book. The book is a welcome addition to the literature on the subject and will be of use to lawyers and insurance companies alike.

THE
MADRAS LAW JOURNAL.

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CHANGE IN THE WORKING HOURS OF THE HIGH COURT.

The High Court sits from the first of this month at 11 A.M. (corresponding to 10 A.M. according to the time observed till that date) and the commencement of the judicial labours is thus in effect advanced by half an hour. Any change in the working hours of the Courts is a matter affecting alike the Bench, the members of the Bar and the litigant public. "Go by the clock and you will not be in difficulties" is no doubt attractive advice but hardly fits into the Indian habits of life, particularly those of the Hindus. "Go by the sun and regulate your round of duties" has been their guiding principle and it will not be easy for them to adjust themselves to the changed conditions. The religious duties starting with the rising of the sun cannot be pushed back; nor will it be easy for practitioners in a hurry not possessing conveyances of their own to find accommodation in public conveyances during the hours of 9-30 and 10-30 A.M., in view of the considerable reduction in the number of vehicles plying and the congestion likely to be caused in passenger traffic due to all Government and other offices being scheduled to start work more or less at about the same time. We do not know whether the hours of working hitherto observed have been a source of inconvenience to any or whether the change is due to other paramount reasons. Be that as it may, it would have been satisfactory if the opinion of the Bar had been ascertained generally before any final decision was reached in the matter.

Apropos of the change in the working hours, it will be interesting to recall that in England in the 15th century the Courts used to sit at 8 A.M., but the judicial session was short and terminated at 11 A.M. Later on, as stated by Sir Frederick Pollock (the father of the great jurist) the Courts began to sit at 9 A.M. and continued till 4 P.M. Later still, the sittings commenced at 10 A.M. and it is to Mr. Justice Willes, one of the first Judges to live out of London, that the legal profession owed the practice of the Courts starting to function at 10-30 A.M. If in England where daylight fails early the Courts can start work at 10-30 A.M., in India where daylight continues for a long time, surely no inconvenience is likely to result by the Courts commencing their work at 11-30 A.M. according to the new standard time.

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THE MADRAS AGRICULTURISTS' RELIEF (AMENDMENT) BILL, 1942.

In February, 1941, the case for a Validation Act was pressed on the attention of the Government for immediate action.[1] Since then a year and a half has passed. A Bill has now been published for eliciting public opinion and there is not much chance of the Bill becoming law before the beginning of 1943, even if the Government could spare time and attention for this matter in the midst of its present engrossing preoccupations.

Remedial legislation may be welcome at any time if it should relate to the permanent rights and duties of citizens. The Agriculturists' Relief Act is itself a remedial legislation of temporary interest only, intended in the main to give relief to debtors in respect of their debts as on a particular date, namely, 1-10-1937. Since then parties have resorted to Civil Courts and at present a good part of the disturbing effects of the Act may be considered to have become a thing of the past. Two Judges of the High Court before whom most of the cases relating to the Act have been posted, have imparted a fair degree of uniformity of interpretation and application and it would seem that litigants and lawyers have more or less settled down over the disturbance created by the Act with all its inequalities and incongruities.

When in 1941 remedial interference was called for by reason of a Full Bench decision taking away a right of appeal in one matter attempted to be conferred by the rules, prompt legislation was of the very essence of the relief to be provided for. In matters like the present, delayed relief is likely to do more harm than the supposed mischief of a declared law by an authoritative decision of a Full Bench. Whether the Full Bench decision is right or wrong, whether the particular rule is *intra vires* or *ultra vires*, the situation has quieted down to an extent that one may take leave to doubt whether after all this delay, a Validation Bill will in any degree be a blessing. It may even be thought unwise that a remedial legislation should be staged at a time when it is likely to cause further disturbance of settled rights and notions.

The Madras Agriculturists' Relief Act provided by section 19 for an application to Courts which had passed decrees, for settling the amount due after scaling them down in accordance with the provisions of the Act. That application was one to amend a decree or to enter up satisfaction of a decree as the case may be. A Bench of the High Court on 20-9-39 took the view that petitions under section 19 of the Act raised questions relating to the discharge or satisfaction of the decree and therefore came within section 47, Civil Procedure Code. On 21-7-39 another Bench of the High Court took the view that an application under section 19 did not raise a question relating to the execution of the decree in the absence of a pending execution application and no appeal therefore lay against orders passed under section 19. When judicial opinion thus differed, the Government

1. (1941) 1 M.L.J. p. 31 (Journal).

framed certain rules with a view to give effect to the provisions of the Act. They preferred to state in the form of rules that orders on applications under section 19 were appealable as from orders under section 47, Civil Procedure Code (rule 8). The rules thus framed may well be regarded as declaratory of the view of the Legislature. Several appeals had been filed and had been disposed of or were pending when the High Court constituted a Full Bench for deciding the question whether the rules in so far as they related to appealability of orders under section 19 were *ultra vires* the Provincial Government. On 5-12-1940 the Full Bench declared that the provision in those rules relating to appeals in so far as it related to orders passed under section 19 of the Act was beyond the rule-making powers and that appeals from orders under section 19 were incompetent.

It was pointed out however that an appeal might lie from the amended decree if the decree was amended under section 19 of the Act. Nothing was said as to cases where by virtue of section 8 the debt should be declared discharged nor as to cases where the application under section 19 might have been wrongly rejected.

As a result of the Full Bench decision, appeals already filed in several Courts became infructuous or were withdrawn. Revision Petitions were filed in several cases—sometimes after the long delays being excused. Some Revisions were dismissed on the ground that appeals lay from amended decrees to the proper Courts. Other Revisions and Miscellaneous Appeals in the High Court got converted into regular appeals as from amended decrees. The High Court helped quicker disposal by treating the order under section 19 as the amended decree and merely collected court-fees as on an appeal from an amended decree. In several cases parties were unable to pay the heavy court-fee required as on an appeal from an amended decree, and were obliged to allow their appeals to be dismissed for non-payment of court-fees; in other cases appeals were filed, heard and decided and costs have been incurred, taxed and paid on the basis of an appeal from an amended decree.

Orders under section 19 were thus being brought up for review partly under the guise of an appeal from an amended decree and partly by way of revision. The High Court has with the existing machinery and with a liberal interpretation of the provisions of section 115, Civil Procedure Code, managed to minimise the hardships that may be said to have resulted from the Full Bench decision.

It seems in the first place highly undesirable to revive controversies over settled matters particularly as the proposed amending Bill is not content with merely regularising the rules under the Act but proposes to enlarge retrospectively the extent of the appealability regarding orders passed under the Act.

In the statement of objects and reasons it is recited that retrospective effect is intended to be given as and from 27-10-1939. We would suggest that retrospective effect if at all, may be given for the sake of uniformity from the date of the Act itself except as to applications and orders regarding non-decretal debts, appeals from which were provided or for the first time in the rules framed on 27-10-1939.

We would suggest that retrospective operation of the provision relating to appealability should be given from the date of the Act, 22-3-1938, and not merely from 27-10-1939 because even the rules framed therefor on 27-10-1939 on a permissible understanding of the same gave such retrospective operation. The language of the rule is " as if such order related to the execution, discharge or satisfaction of the decree " and it looks as if it expressed a preference for the view taken in *Jami Venkatappadu* v. *Kamepalli Ramamurthi*,[1] and it will not be out of place to note here that the question of the retrospective operation of the rules was raised in the Full Bench case but was not decided in view of their conclusion that rule 8 was *ultra vires* the rule making powers.

In the case of non-decretal debts, the rules were first framed on 27-10-1939 and consequently retrospectivity can be given with effect from that date. The rules which were framed for non-decretal debts have been declared by the High Court to be within the rule-making powers, see *Swayamprabhai Ammal* v. *Muthukrishna Padayachi*[2] and *Venkayya* v. *Pullayya*.[3] This is now the settled view and in view of the practice of the High Court there is no likelihood of a different view being taken in this matter.

It would have been therefore sufficient to confine the Bill to merely rectifying the effect of the Full Bench decision. But if legislative authority is still believed to be necessary in the case of non-decretal debts, we would suggest that the provisions in section 19-A of the Bill may be enacted subject to the amendments pointed out herein.

We would suggest an amendment to the proviso in section 19-A (1) and (9) for the purpose of removing unnecessary hardships to honest and diligent litigants who otherwise may get punished for justifiable ignorance. It may be that there are cases where a creditor having an option to sue in more than one Court filed his suit in one Court and the debtor filed his application under the Act in another Court also having jurisdiction over the subject-matter of the debt. The proposed amendment would compel the suit and the application to be got together by the provisions for a return and a representation, and the entire matter being disposed of as part and parcel of one litigation. We would accordingly suggest the following amendment to section 19-A (1), namely, that the proviso should be deleted and the following proviso inserted :—

" Provided that any such application shall be transmitted to the Court where a suit for the recovery of the debt is pending and shall be treated as an application in such suit, and be disposed of in accordance with the Act."

Sub-section 19-A (3) is likely to create difficulties particularly in suits on mortgages or where there are several debtors and creditors, sureties etc. and the enquiry may be unduly prolonged in such cases and we would suggest the following amendment:—

" All persons interested in or liable to pay the debt may be made parties to such an application but orders on such applications shall

1. (1939) 2 M.L.J. 853. 2. (1942) 1 M.L.J. 303.
3. (1942) 1 M. L. J. 390.

not prejudicially affect the rights and liabilities of persons not made parties to such a proceeding."

In section 19-A (4) we would suggest that for the words "pass an order" the following words may be substituted :—

"enquire into the nature and amount of the liability and pass an order" or

"pass an order after due enquiry."

In sub-section (5) after the words "for such amount" the words "and grant, after notice to the debtor, such time for payment thereof as it may think fit" may be inserted.

Sub-section (8) may be suitably amended by making the provisions of the Civil Procedure Code relating to setting aside *ex parte* decrees and orders, applicable to proceedings under the Act. There has always been a divergence of opinion as to whether the provisions of the Code relating to matters after a decree has been passed are made applicable by the wording now adopted in sub-section 8 of the Bill. Some of the provisions like setting aside *ex parte* orders and decrees and orders of dismissal for default and provisions by way of review are so salutary that they ought to be incorporated in the powers of Courts dealing with an application or an appeal under the Act. We would accordingly suggest a separate sub-section 19-B or 25-B as follows :

"The provisions of the Code of Civil Procedure shall so far as may be, apply to applications, appeals and orders under this Act."

Sub-section (9) like sub-section (1) may operate harshly in certain cases where the creditor has filed a suit in ignorance of a proceeding by the debtor under the Act and consequently we would suggest that sub-section (9) may be amended as follows :

"No creditor shall, after notice to him by the debtor of an application made by the debtor to a Court, file a suit for the recovery of the debt sought to be scaled down, and any such suit filed by a creditor in ignorance of a debtor's application under the Act may be treated as an application for a decree under sub-section (5) and disposed of accordingly."

No provision is made in the amending Bill for the costs of the proceedings and if what has been suggested for sub-section (8) is accepted, the powers of Courts relating to costs will also apply to proceedings under the Act; otherwise it will have to be specially provided for.

APPEALS : In the provisions relating to appeals it may be necessary to consider the case of decrees of Small Cause Courts in respect of which ordinarily no appeals lie but only revisions to the High Court and consequently if the provision for appeals is intended to be retained as it is, the forum of appeal ought to be indicated. There is a lacuna about the procedure to be followed in appeals and if what we have suggested for sub-section (8) is accepted the lacuna will disappear.

There is no provision for an appeal against orders passed under section 15 (4) and it may be desirable to introduce a clause therefor in the new section 25-A.

Section 25-A sub-clause (c) may be amended so as to confer a right of appeal both to the creditor and the debtor in respect of the debtor's status as an "agriculturist".

Section 4 and restoration of Appeals: Where any appeal stood dismissed or withdrawn either on the ground that no appeal lay or that court-fee as on an appeal from an amended decree had not been paid, the Court must be empowered to restore the appeal to its file on the application of any party thereto made within three months of the date when this Act comes into force.

Where an appeal had been converted into a revision and relief which might have been granted in the appeal was denied to any party such party must also be empowered to apply within 3 months for a rehearing of the revision with a view to reconvert it into an appeal.

In view of certain difficulties felt by Courts in dealing with certain classes of orders it may perhaps be expedient merely to refer to orders passed by Courts under certain specified sections of the Act instead of attempting to define the class of orders in the provision relating to appeals.

Retrospectivity and sections 4, 5 and 6: Section 4, sub-section (2) may be omitted. Difficulties of interpretation having started from 1939 it would be fair that a fresh period of three months from the date of this Act should be granted for filing appeals against all orders referred to in section 25-A and passed before the commencement of this Act.

Several appeals had not been filed under legal advice on the then state of the law and there is no reason why liberty should not also be allowed to parties to file appeals in cases where appeals are now desired to be filed. Indeed this is not likely to increase the volume of litigation for most of the difficult questions of construction arising under the Act have by now been settled by the High Court and the parties are likely to move the Courts only in clear cases by virtue of the retrospective provisions. It is believed that such instances are likely to be few at present and by the time when the Act should come into force, such cases will become fewer still.

Section 6 should not be limited to the period 27-10-39 but retrospective effect should be given to it from the date when the Act came into operation originally *i.e.* 22-3-1938 except in the case of non-decretal debts for which the rules were framed on 27-10-1939 for the first time.

The Act by its retrospectivity is apparently intended to place the parties in the position in which they would have been if the rules had not been declared *ultra vires*. In very many cases the High Court and the lower Courts have collected heavy amounts by way of court-fees and costs have been taxed and paid as on an appeal from an amended decree instead of as on a miscellaneous appeal. Are these unfortunate persons to be left without a remedy? Provision should be made for fresh taxation of court-fees and costs on the scale of miscellaneous appeals from the orders instead of on the basis of an appeal from an amended decree, and for refund of excess Court fees and costs.

Then there may be a further question whether the amending Act in so far as it relates to procedure and limitation should have the consent of the Viceroy under section 107 of the Government of India Act. Already there has been considerable delay and we trust that the Provincial Government will obtain the consent of the Government of India under section 107 sufficiently in advance and speed up the Amending Act.

SUMMARY OF ENGLISH CASES.

CHARLES OSTENTON AND CO. *v.* JOHNSTON, (1942) A.C. 130 (H.L.).

Practice—Reference to Official Referee—Investigation involving question of negligence of professional persons—Absence of appeal on findings of fact by referee—Exercise of original discretion by lower Court—If can be interfered with on appeal.

Where the findings of an Official Referee on questions of fact will be final and no appeal was permissible, investigation involving question of negligence of professional persons ought not to be referred to an Official Referee thereby depriving the right of the party to be tried by a normal tribunal with a right of appeal.

(1940) 2 K.B. 123 reversed.

Re TANKARD: TANKARD *v.* MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD., (1941) 3 All.E.R. 458 (Ch.D) : (1942) 1 Ch. 69.

Will—Executors—Liability for loss to estate by delay in realising and paying debts.

Apart from any provisions contained in the will of a testator which expressly or impliedly deal with the payment of the debts, it is the duty of executors as incidental to the due administration of the estate to pay the debts of the testator with due diligence having regard to the assets in their hands which are properly applicable for that purpose, and, in determining whether due diligence has been shown regard must be had to all the circumstances of the case. The duty is owed not only to the creditors but also to the beneficiaries, for, the ultimate object of administration of an estate is to place the beneficiaries in possession of their interest, and that object cannot be fully achieved unless all debts are satisfied. There is no rule of law that it is the duty of executors to pay debts within one year. The duty is to pay with due diligence and if debts are not paid within one year the onus is thrown upon the executors to justify the delay. As beneficiaries take under the provisions of the will full effect has to be given to the terms giving the executors power to retain assets. Where the estate is saddled with speculative assets like shares the executors have a discretion to give the speculation a fair run. If by reason of the delay the shares fall in value and result in loss, the executors are not liable as their power of retention has been properly exercised.

In re SKINNER : MELBOURNE *v.* SKINNER, (1942) 1 Ch. 82.

Will—Annuity "free from income tax"—Directions—Form of.

1. If a testator directs payment of an annuity out of the income of his estate, the annuity is not payable free of income-tax unless

there is a direction in the will to that effect. If there is no such direction, income-tax is payable by the annuitant.

2. It makes no difference to the application of that rule if, in fact, the annuity is paid out of income from which income-tax has been deducted at the source before it reaches the trustees.

3. The mere use of the words " a clear annuity " or free of all deductions will not constitute a sufficient direction.

If a testator desires to free an annuitant from the payment of income-tax, he will use the words " free of income-tax," and if he wants to exclude surtax, will add the words " but not free of surtax."

Re APEX SUPPLY CO., LTD., (1942) 1 Ch. 108 : (1941) 3 All.E.R. 473 (Ch.D.)

Hire purchase—Provision for payment of a minimum amount if article returned or retaken within a certain period—Whether penalty or liquidated damages—Provision if in fraud of bankruptcy laws.

By a common form of hire purchase agreement X company (the owner) agreed to let and *Y* company (the hirer) agreed to hire certain articles of second hand machinery. It was provided that a sum of £ 252 should be paid on or before delivery of the goods and that a total rent of £ 1108-16-0 should be paid in 12 monthly instalments of £ 92-8-0 each, the first instalment to be paid one calendar month after the date of the agreement, and that the period of hire should be 12 months commencing from the same date. Then by another clause it was provided that if the hirer should return the goods or if the owners should retake the same before the expiration of 9 months from the date thereof, for any of certain specified reasons, the hirer should pay a further sum which with the previous payments made by him, should equal the sum of £1020-12-0 by way of compensation for the depreciation of the goods. After the delivery of the goods *Y* the hirer company went into liquidation within 9 months and *X* the owners claimed the consolidated sum of £1020-12-0 from the liquidators.

Held, that (1) the amount claimed was neither a penalty nor liquidated damages and even if it were, it was a genuine pre-estimate of the damage sustained. It was a separate contract to pay a certain sum in a certain event and that event having happened the sum became payable;

(2) the claim was not one in fraud of bankruptcy laws as it arose in a multitude of cases only one of which was the liquidation of the company.

VANDYKE *v.* ADAMS, (1942) 1 Ch. 155.

Practice—Defendant a prisoner detained in enemy territory—If " enemy " —Service of summons on cannot be dispensed with—Rules of Supreme Court, Order IX, rule 14B (1).

A soldier in His Majesty's army who has been taken prisoner during the war and is detained in enemy territory, is not an " enemy " in any sense of the word and therefore service of summons of an action against him cannot be dispensed with under the Rules of Supreme Court, Order IX, rule 14 B (1).

WILLIAMS-ASHMAN *v.* PRICE & WILLIAMS, (1942) 1 Ch. 219: (1942) 1 All.E.R. 310 (Ch.D.).

Trusts—Constructive trustee—Solicitor acting for trustee—When liable for breach of trust.

In a suit by the beneficiaries against the trustee's solicitor, through whom a mortgage transaction was put through and subsequently the proceeds recovered were invested in preference shares in a company and a loan to the trustee's son, alleging that as he knew the money to be trust money he became a constructive trustee of the money and had the duty of showing that the trust money was duly applied in accordance with the trust,

Held, that the agent (solicitor) so long as he acts honestly owes no duty to any one except his principal and that he only becomes liable as a constructive trustee if he intermeddles in the trust by dealing with or disposing of the trust money without his principal's instructions. In the circumstances the solicitor cannot be made liable for breaches of trust committed by the express trustee.

JONES *v.* SHERWOOD, (1942) 1 K.B. 127.

Criminal trial—Conviction of alternative offences—Invalidity.

A person was charged with having committed assault or battery. On the facts proved he was guilty of battery. The justices convicted him in an alternative form, finding him guilty of assault or battery. On appeal,

Held, a conviction of alternative offences is bad and must be quashed as a person may be guilty of an assault without being guilty of a battery.

COLE *v.* LYNN, (1942) 1 K.B. 142 (C.A.).

Debtor and creditor—Assignment of debtor's property for benefit of creditors—Covenant by creditors not to sue debtor—Rights against sureties reserved—Surety's right of indemnity against the debtor—Enforceability.

Where there is an assignment of the debtor's property for the benefit of his creditors, although the provisions of the law of bankruptcy are to be imported into the deed for the purpose of ascertaining the manner and proportions in which the proceeds of sale of the property comprised in the deed are divisible among the creditors the extent of the protection obtained by the debtor by virtue of the covenant not to sue is dependent entirely on the wording of such covenant where the provisions of the law of bankruptcy are not expressly or by implication imported into the terms of the covenant. Accordingly, where under the covenant the assenting creditors are not to sue on account of their debts but the deed is not to affect the rights and remedies of the creditors against any surety the covenant did not affect a surety's consequential right of indemnity against the debtor though the surety was among the assenting creditors. The reservation as between creditor and debtor of the rights against the surety imports the continuance unimpaired of the surety's right of indemnity against the debtor.

DE BUSE v. MCCARTHY, (1942) 1 K.B. 156 (C.A.).

Tort—Libel—Borough Council meeting—Agenda in notice containing copy of committee's report containing defamatory statements—Transmission to public libraries—Publication—Whether privileged.

After the discovery of a shortage of petrol at one of a Borough Council's depots and the conviction of two employees for stealing the petrol, the Council appointed a committee "to inquire into the circumstances relating to the loss of the petrol" and to report thereon. One of the convicted employees had during the trial made statements tending to implicate a number of his fellow employees and in their report the committee set out a list of the names of such employees including those of the plaintiffs. The committee stated that the accusations had been reiterated before them and that the employees concerned had emphatically denied the accusations. The report contained in terms no statement that the committee found the charges proved in whole or in part, but there was a recommendation that the employees named, including the plaintiffs, should be removed from their existing positions and transferred to other positions. The town clerk sent a notice of a meeting of the Council to consider *inter alia* the report of the committee. Copies of the notice containing a full copy of the committee's report were affixed near the door of the town hall where the council was to meet and were also sent to each of the public libraries in the borough in accordance with long standing practice approved and authorised by the Council. In an action against the town clerk, mayor, alderman and councillors by the plaintiffs for damages for libel alleging that the defendants meant that each of the plaintiffs had been a party to the stealing of the petrol,

Held, that the publication was not privileged as there was no duty or interest to make the communication to the rate payers at that stage.

MONK v. REDWING AIRCRAFT CO., (1942) 1 K.B. 182 (C.A.).

Practice—Particulars—Claim for special damages for wrongful dismissal—Particulars from plaintiff of other employment after dismissal and period of reasonable notice—When to be ordered before delivery of written statement—Rules of practice—If can affect discretion of Judges in special circumstances.

In an action for damages for wrongful dismissal claiming reasonable notice and averring special damage the plaintiff must give sufficient particulars of it. He must state either that he has not earned any remuneration in other employment during the relevant period or that he has done so and any form of pleading or any particulars given which do not bring to the clear knowledge of the defendant which of the two implicit statements he is going to rely on, is embarrassing. Also the defendant is entitled to have particulars of what the plaintiff claims to be reasonable notice. The ordering of such particulars before delivery of defence is desirable to enable the defendants to decide whether they will pay money into Court and if so what amount and plead the same in defence. There is no rule of practice that particulars of special damages cannot be ordered. Rules of practice grow up and justify themselves as indicating that in the ordinary case judicial discretion will not be exercised in a particular way, but no such rule of practice can be binding where complete discretion is

given, and if a Judge considers that an order should be made in the special circumstances of the case before him, he is certainly not bound to follow rules of practice of that kind.

OWENS *v.* MINOPRIO, (1942) 1 K.B. 193.

Criminal trial—Autrefois acquit—*Applicability—Withdrawal of summons as information not laid by authorized person—Second information for same offence—Not barred.*

A withdrawal of a summons on a preliminary point (namely that the information had not been laid by the authorized person) is not equivalent to a dismissal or an acquittal. The basic principle of the plea of *autrefois acquit* is that the person charged has already been put in peril and no man is to be put in peril twice in respect of the one charge. But where there was no withdrawal of the first summons on the merits, but in consequence of an informality in the proceedings and to correct that informality a second information was laid by a different person the justices are bound to hear the second information.

[*Pickavance* v. *Pickavance*, (1901) P. 60 at 63 held to be *obiter* and *Davis* v. *Morton*, (1913) 2 K.B. 479, applied.]

CHARENTE STEAMSHIP CO., LTD. *v.* WILMOT, (1942) 1 K.B. 210.

Income-tax—Replacement of obsolete machinery—Deductions for—Computation of amount.

A company owned a fleet of steamships. From time to time ships which were deemed to have become unsuitable for the company's business were sold and replaced by others. Three ships became obsolete in the year of assessment. In the case of one ship the allowances for wear and tear together with its sale price were less than the original cost of the ship while in the case of the other two ships the amount exceeded the original cost. On a construction of the relevant rules,

Held, that the company was entitled to an allowance in respect of the replacement of the one ship without taking into account the surplus arising in the case of the other two ships.

R. *v.* WANDSWORTH JUSTICES: *Ex parte* READ, (1942) 1 K.B. 281.

Criminal trial—Conviction by Court of summary jurisdiction—Proper remedy where there is denial of natural justice is by certiorari *application to High Court.*

Where an accused is convicted before a Court of summary jurisdiction and there has been a denial of natural justice the proper remedy is not by case stated or appeal to quarter sessions but by application to the High Court for an order of *certiorari* to quash the conviction.

KERR *v.* KENNEDY, (1942) 1 K.B. 409 : (1942) 1 All.E.R. 412 (K.B.D.).

Tort—Defamation—Slander of Women Act (1891)—*Imputation of lesbianism to a woman—If amounts to imputation of unchastity which will be actionable without proof of special damage.*

The imputation of *lesbianism* to a woman is an imputation of "unchastity" within the meaning of the Slander of Women Act (1891) and she can succeed in an action for damages for slander notwithstanding that no pecuniary damage had been pleaded or proved by her.

WARE *v.* WARE, (1942) P. 49.

Divorce—Desertion for three years—Preceding petition for divorce—If can be broken by mere offer to return by the other spouse which is not genuine.

The principle laid down by the House of Lords in *Pratt* v. *Pratt*, (1939) A.C. 417 (that "if at any time during the three years preceding the presentation of the petition a deserting wife or husband makes a genuine offer to return to the other spouse and the other spouse refuses to accept that offer, the desertion is terminated") can be applied only if the Court is satisfied that there is a genuine offer to resume cohabitation and to behave properly as husband or wife as the case may be. Otherwise a great injustice might be done to a spouse who had been deserted for nearly three years if, at the eleventh hour when he was about to file a petition, he could be defeated by the stratagem of the offending spouse offering to return although not contrite or anxious to resume married life.

BLACKENBOROUGH *v.* SPALDIN URBAN DISTRICT COUNCIL, (1942) 1 All.E.R. 34 (H.L.).

Tort—Steer escaping into the highway from a pen in a market—Death caused by the steer to person on the highway—Market authority—Not liable.

A market for cattle and sheep cannot be treated like a menagerie of lions and tigers (though in the latter case the duty to prevent escape would in any event be higher). Cattle are animals *mansuetae naturae* and as a rule are peaceable beasts. The market authority is under no legal obligation to provide any pens. The provision of pens in a market by the market authority is not a duty undertaken in discharge of obligations to the public. Such provision is a convenience for improving the management and organisation of the market, and the liabilities which may arise from such provision are liabilities to those who use pens or resort to the market and not to the public at large. Accordingly the market authority is not liable for death or injury caused to a person on the highway by a steer escaping from the pen and running amok.

LORY *v.* GREAT WESTERN RAILWAY CO., (1942) 1 All.E.R. 230 (K. B. D.).

Torts—Damages—Pension from other funds—If can be deducted from damages payable under Fatal Accidents Act.

A widow claiming for the estate, and for herself and two children under the Fatal Accidents Act, claimed damages in respect of the death of her husband, alleged to have been due to the negligence of the defendants. The defendants admitted negligence and liability. On the question of damages,

Held, in estimating the damages to which the family is entitled, deductions have to be made in respect of pensions paid to the widow and the children from some pensions fund. The possibility of the widow's death and that of the children and the widow's remarriage must also be taken into account in fixing the amount of damages.

Re CENTRAL EMPLOYMENT BUREAU, (1942) 1 All.E.R. 232 (Ch. D.).

Charity—Establishment of fund for helping educated women and girls to become self-supporting—If valid charitable trust.

The object of a loan fund was stated to be :—" The fund exists solely for the purpose of helping educated women and girls to become self-supporting, and has no commercial object in view."

Held, in so far as it is educational it is a good charity. The implication of the gift to enable the recipients to become self-supporting is a sufficient indication that they stand on the poverty side of the border line, in the sense that they cannot be self-supporting in whatever enterprise they embarked without the assistance of the fund. Accordingly the trusts of the fund are valid charitable trusts.

Re AMAND, (1942) 1 All.E.R. 236 (K.B.D.).

Constitutional Law—Governments of allied states in England—Conscription of their subjects found in England—Power to issue decree for.

It is not contrary to British Constitutional law for the Government of an allied state (in this case the Netherlands Government) established in England with the consent of the British Government to issue a decree conscripting its subjects resident in England.

STOKER *v.* ELWELL, (1942) 1 All.E.R. 261 (Ch.D.).

Interest—Charging order silent as to interest—Interest payable.

Though interest is not mentioned in a charging order, it is nevertheless payable because when the Court has once decided that there is a charge the sum charged must bear interest.

CERAMIC (OWNERS) *v.* TESTBANK (OWNERS), (1942) 1 All.E.R. 281 (C.A.).

Practice—Appeal—Collisions at sea—Apportionment of liability between joint tort-feasors by trial Judge—Power of appellate Court to vary.

In deciding how much a ship is to blame for a collision, the Court has to decide a question which is just as much one of fact as is the question whether she is to blame at all. If an appellate Court is of opinion that the trial Judge has taken a wrong view of the respective degrees of blame to be attributed to the colliding vessels, it has, not only the right but the duty to give effect to its opinion.

REDPATH BROWN & CO., LTD. *v.* HAYES, (1942) 1 All.E.R. 298 (C.A.).

Workmen's compensation—Refusal of workman to have injured leg amputated—Reasonableness—Effect on liability of employer.

A workman's foot was crushed in an accident and after the removal of some bones, though still suffering considerable pain, he was able to

walk two miles slowly with a stick. The employers on other doctor's advice wanted the workman to have his foot amputated which he refused under the advice of another eminent surgeon.

Held, the refusal was not unreasonable in the circumstances. The employers can succeed only if they can establish that the man unreasonably refused to accept the offer to have an artificial foot supplied to him for the rest of his life in place of the injured natural foot which he was asked to get amputated.

FOSTER *v.* GILLINGHAM CORPORATION, (1942) 1 All.E.R. 304 (C.A.).

Tort—Negligence—Local authority placing barriers across road on account of bomb damage—Liability for failure to keep the obstruction lighted.

Where the local authority places barriers across the road on account of bomb damage it is its duty to keep the obstruction lighted. Where the plaintiff while riding a bicycle received injuries through colliding with the obstruction owing to its not being lighted he is entitled to recover damages from the local authority.

Re FOSTER AND SONS, LTD., (1942) 1 All.E.R. 314 (Ch.D.).

Company—Winding up—Surplus assets—Rights of preference shareholders—Extent and nature of.

Once a company has gone into liquidation, everything the company has, after it has satisfied its debts, is to be regarded as surplus assets and to be distributed amongst the members without regard to the particular provisions in the articles dealing with the payment of dividends which *prima facie* apply only while the company is a going concern. Such surplus assets or any part thereof cannot be regarded as profits available for distribution among the preference shareholders in accordance with the articles of association.

The surplus assets, remaining after repayment of capital paid on the shares to the ordinary and preference shareholders, ought to be distributed between the preference shareholders and ordinary shareholders *pari passu* in accordance with the nominal amount of their shares.

GOLD *v.* ESSEX COUNTY COUNCIL, (1942) 1 All.E.R. 326 (K.B.D.).

Tort—Negligence—Radiographer by error of judgment not applying sufficient screen while applying X-ray—Injury to patient's face—Hospital if liable.

The duty which the law implies in the relation of the hospital authority to a patient and the corresponding liability are limited. The governors of a public hospital, by their admission of the patient to enjoy in the hospital the gratuitous benefits of its care, undertake that the patient whilst there shall be treated only by experts, whether surgeons, physicians or nurses, of whose professional competence the governors have taken reasonable care to assure themselves: and, further that those experts shall have at their disposal, for the care and treatment of the patient, fit and proper apparatus and appliances. But the hospital authority does not make itself liable in damages, if members of its professional staff, of whose competence there is no question, act negligently towards the patient in some matter of professional care or skill, or neglect to use, or use negligently in their

treatment the apparatus or appliances at their disposal. Accordingly where a patient's face was injured by reason of the inadequate screening due to an error of judgment while a radiologist was giving X-ray treatment for removal of warts the hospital authority is not liable for damages for the negligence.

HUTCHINSON *v.* LONDON AND NORTH EASTERN RAILWAY COMPANY, (1942) 1 All.E.R. 330 (C.A.).

Tort—Railway—Statutory duty to provide lookout "where any danger is likely to arise" to workmen—Ganger killed while working on line—Liability.

A statutory rule required the railway company to provide a lookout "in all cases where any danger is likely to arise." Where gangers working on a line (along which trains were likely to pass every few minutes) were killed by an on coming train a railway company which did not provide the lookout, cannot contend that the danger was not an exceptional danger and the rule did not apply. If a lookout had been provided the accident would not have happened. The railway company is therefore liable for damages.

HEYMAN *v.* DARVINS, LTD., (1942) 1 All.E.R. 337 (H.L.).

Arbitration Act (1889), S. 4—Repudiation of contract containing arbitration clause—Suit for damages for breach of contract—Stay of—Right to at instance of repudiating party.

What is commonly called repudiation or total breach of contract, whether acquiesced in by the other party or not, does not abrogate the contract, though it may relieve the injured party of the duty of further fulfilling the obligations which he has undertaken to the repudiating party. The contract survives for the purpose of measuring the claims arising out of the breach; and the arbitration clause, if there is one, survives for determining the mode of their settlement. The purposes of the contract have failed but the arbitration clause is not one of the purposes of the contract. The doctrine of approbate and reprobate does not apply to prevent the party who had declined to proceed further with the performance of his obligations to the other party from invoking the arbitration clause for the purpose of settling all questions to which his declinature has given rise. Accordingly where a suit is filed for damages for breach by repudiation of a contract containing an arbitration clause, the repudiating party can ask for the stay of the legal proceedings and take advantage of the arbitration clause.

R. *v.* HOME SECRETARY: *Ex parte* BUDD, (1942) 1 All.E.R. 373 (C.A.).

Habeas corpus—*Release of person arrested under invalid order—Re-arrest—If barred by principle of* autrefois acquit.

Where on the issue of a writ of *habeas corpus* a person detained under the *Defence Regulations* was released on the ground that the pre-requisites of a lawful detention had not been complied with, the principle of *autrefois acquit* is not applicable and will not bar a subsequent detention.

REGAL *v.* GULLIVER, (1942) 1 All.E.R. 378 (H.L.).

Companies—Directors' fiduciary capacity—Acquisition by directors of shares in subsidiary company—Profit made by resale of such shares—Liability to account to the company.

The directors of the Regal (a company) with a view to the future development or sale of their company, were anxious to extend the sphere of its operations by the acquisition of other cinemas. In Hastings and St. Leonards there were two small cinemas called the Elite and the DeLuxe. Negotiations began both for their acquisition or control by lease or otherwise and for the disposal of the Regal itself. A subsidiary company was created for the purpose with a capital of £5,000 in £1 shares. The directors were the same as those of the Regal with the addition of one Garton. It was thought that only £2,000 of the capital was to be issued and that it would be subscribed by the Regal who would control it. The five directors and a solicitor of the company subscribed 500 shares each and the capital of the new company was fully subscribed, the shares duly paid for and allotted. These shares were afterwards sold at substantial profits.

Held: At all material times the directors of the main company were in a fiduciary position and they used and acted upon their exclusive knowledge acquired as such directors. They sought no authority from the company and by reason of their position and action made large profits. Accordingly they are liable to account to the company for the profits so made, but not so the solicitor and non-director in the main company.

BANK POLSKI *v.* MULDER & CO., (1942) 1 All.E.R. 396 (C.A.).

Bill of exchange—Bills drawn in Poland and accepted in London expressed to be payable in Dutch currency at named bank in Amsterdam—If general or local acceptance.

Bills were drawn in Poland and were accepted in London by a bank, and they were expressed to be payable in Amsterdam, at a named bank there, in Dutch currency. In an action upon the bills,

Held, that in the absence of an express statement that the bills were payable "only at the place specified and not elsewhere," the acceptance was not a local acceptance. The currency in which the bills is payable and the place of payment specified on the face of the bill do not indicate that the parties intended payment to be made at the specified place and there only. (1941) 2 All.E.R. 647, affirmed.

DRUMMOND *v.* HAMER, (1942) 1 All.E.R. 398 (K.B.D.).

Arbitration Act (1889), *S.* 6 (b)—*One party appointing arbitrator and giving notice to the other requiring the appointment of the other arbitrator within seven days—Default—Necessity to again appoint sole arbitrator.*

One of the parties after a reference to arbitration appointed his arbitrator. The other party however failed to appoint an arbitrator on his behalf and consequently was served with a notice requiring him within seven days from the service thereof to name an arbitrator to act on his behalf in the matters submitted, failing which the matter would stand referred to the arbitrator appointed by the first party

as the sole arbitrator. After the seven days had expired the arbitrator proceeded to act alone in the reference. On the question of the validity of the award by him,

Held, that the notice was in effect a mere statement to the other party that, as a matter of law, the one arbitrator is a sole arbitrator and it is not an appointment as sole arbitrator. Under section 6 (*b*) of the Arbitration Act the party giving the notice has to expressly appoint his arbitrator as sole arbitrator in the submission.

HOLT *v.* HEATHERFIELD TRUST, LTD., (1942) 1 All.E.R. 404 (K. B. D.).

Garnishee order—Assignment of debt prior to order—Not completed by receipt of notice by debtor—Effect—Priorities—Equitable assignment.

X and *Y* obtained judgment against *A* for £313-14-9 on June 19, 1939, for costs of an unsuccessful action brought against them by *A*. On June 15, 1940, they obtained a garnishee order *nisi* on some money owing by *C* to *A*, which was served on *C* on June 17. *A* had on June 14, 1940, the very day he recovered judgment against *C* assigned the amount due from *C* to *H* who received the assignment the next day. On June 17, *A* and *H* sent notices of assignment to *C* who did not receive them until June 18. In the circumstances *X* and *Y* claimed that (1) the assignment to *H* was void and a fraud on them and other creditors; (2) alternatively that on the date on which their garnishee order became effective (*i.e.*) June 17, 1940, *H's* title was incomplete, in that the assignment to him was only an equitable assignment until completed by notice to the debtor, and that, since it was given without consideration it was of no avail as against their rights under the garnishee order. On the evidence it was found that *H* was a *bona fide* creditor of *A*.

Held, that (1) the assignment to *H* was not in fraud of creditors ; (2) the assignment was not complete as legal assignment till the receipt of notice of it by the debtor on June 18, 1940 ; and (3) though the assignment had not been completed by notice according to the provisions of the Law of Property Act, 1925, on June 17 when *X* and *Y* served the garnishee order, it operated as a valid equitable assignment by which the rights of *X* and *Y* under the garnishee order were postponed to that of *H*. A judgment-creditor is in no better position than the assignor and cannot garnishee anything which the assignor could not honourably deal with by reason of the prior equitable assignment.

Re GENERAL MORTGAGE SOCIETY, (1942) 1 All.E.R. 414 (Ch.D.).

Companies (Winding-up) Rules (1929), R. 150—Proxies in favour of Official Receiver for creditors meetings—Validity.

Under the present R. 150 of the Companies (Winding-up) Rules, 1929, in the case of a company which is being wound up by order of the Court, the creditors have a right to appoint the Official Receiver to be their proxy at meetings of creditors convened by the Court. The decisions to the contrary under the old rules, 1881 W.N. 120 and 18 T.L.R. 503 are no longer of any effect.

INCOME-TAX COMMISSIONERS *v.* GIBBS, (1942) 1 All.E.R. 415 (H.L.)

Income-tax Act (1918), *Sch. D, cases I and II—Firm taking in new partner—If cesser in the carrying on of business by old firm and succession by new "person"—Liberal as against literal construction.*

The Income-tax Act (1918), Sch. D, cases I and II, R. 9 reads as follows:—"If a person charged under this schedule ceases within the year of assessment to carry on the trade, profession or vocation in respect of which the assessment is made, and is succeeded therein by another person * * * the Commissioners shall adjust the assessment by charging the successor with a fair proportion thereof from the time of his succeeding to the trade, profession or vocation and relieving the person originally charged from a like amount * * *."

In the case of a stock broker's business carried on for part of the year by *A*, *B*, *C* and *D* in partnership and for the next part of the year by *A*, *B*, *C*, *D* and *E*.

Held (*Lord Russell of Killowen* dissenting), that in the instant case R. 9 must be construed in the popular rather than in a technical sense and that the first partnership must be deemed to have ceased and the second partnership to have succeeded to the first.

(1940) 3 All.E.R. 613 (C.A.), reversed.

RADLEY *v.* LONDON PASSENGER TRANSPORT BOARD, (1942) 1 All. E.R. 433 (K.B.D.).

Tort—Negligence—Public omnibus—Windows liable to come into contact with overhanging branches of road-side trees—Duty of owners to avoid the obstructions.

The duty of the owners of an omnibus is a duty to take at least reasonable care that the passengers shall not be injured while they are in that omnibus. It is the duty to avoid the omnibus running into obstructions, not only on the ground but also in the air (*i.e.*) on the sides higher up like branches of road-side trees. In the absence of any evidence on the part of the owners of an omnibus, a person injured by the breaking of a window of the omnibus by crashing against an overhanging branch is entitled to recover damages on the presumed negligence of the owners.

LEADER *v.* COUNSELL, (1942) 1 All.E.R. 435 (K.B.D.).

Income-tax Act (1918), *Sch. D, case VI—Money realised by sale of right to have mares served by a horse belonging to assessee—Receipt whether of income or revenue nature—Assessability.*

On the death of his owner when *X* a famous race-horse was going to be sold, a number of race-horse owners decided that they would like to join together in order to prevent *X* being taken out of the country. Accordingly, they empowered one *G* to bid for *X* on their behalf. After the purchase by *G*, these race-horse owners made a written agreement under which 24 of them subscribed a sum of £53,000 (£47,000 for the price of the horse and the remainder

for working capital). Each owner took a certain number of shares. In accordance with the agreement they were entitled to send mares to *X* free in proportion to their shares ; but the management of the horse was left in the hands of a committee of three who were to regulate the number of mares which *X* might serve, the price at which he was to stand, and the suitability of the mares which might be sent to him. Subscribing owners who had no mares or no suitable mares were allowed to sell their free nominations to other owners of suitable mares. On the question of the assessability of the amounts realised by the subscribing owner by the sale of such nomination,

Held, that the owners were merely realising the fruits of the horse and the receipts were of a " revenue or income nature " and assessable as such.

BORMAN *v.* LONDON AND NORTH EASTERN RAILWAY CO., (1942) 1 All.E.R. 442 (K.B.D.).

Railways Act (1921), *Sch. III—Amalgamation of railway companies —Dismissal of employees as a measure of retrenchment which would have been done even if there was no amalgamation—If entitles such employees to compensation as for " dismissal on account of the amalgamation."*

Sch. III of the Railways Act provided *inter alia* for compensation for existing officers and servants who suffer damage " by reason of an amalgamation of railway companies." It was found that certain employees were dismissed after an amalgamation to reduce expenses and that they would have been dismissed even if there had been no amalgamation.

Held, on a construction of the relevant provisions of the schedule that the employees were not entitled to compensation as they did not suffer damage by " reason of the amalgamation."

HOBBS *v.* HUSSEY (INSPECTOR OF TAXES), (1942) 1 All.E.R. 445 (K.B.D.).

Income-tax Act (1918), *Sch. D, case VI—Payment for articles in newspaper—Assessability as revenue payment.*

Where an assessee, a solicitor's clerk, received a sum of money for the serial rights in his lifestory the true nature of the transaction is not a sale of copyright of the articles resulting in the realisation of capital but the performance of services, the sale of the copyright being subsidiary thereto.

The receipt therefore is of a revenue nature assessable to income-tax under Sch. D, case VI of the Income-tax Act.

STEELE *v.* GEORGE & CO., (1942) 1 All.E.R. 447 (H.L.).

Workmen's compensation—Fracture of ankle of workman—Refusal of workman to submit to operation—Reasonableness of refusal a question of fact unassailable in Court of appeal.

The question whether a workman was unreasonable in refusing to undergo an operation is a question of fact and where the arbitrator arrived at a finding on proper evidence that the workman was not

unreasonable in refusing to undergo an operation the decision is unassailable in a Court of appeal.

WALES (INSPECTOR OF TAXES) *v.* TILLEY, (1942) 1 All.E.R. 455 (K.B.D.).

Income-tax Act, (1918), *Sch. E—Commutation of salary and pensions—Assessability of amount received.*

A company agreed to pay its managing director £6,000 per annum and a pension of £4,000 per annum for ten years after he ceased to be managing director. Subsequently he agreed to release the company from the obligation and to serve as managing director for £2,000 per annum and in consideration the company agreed to pay him £40,000 in 2 equal instalments.

Held, the payment in commutation of the pension will be assessable as a profit, from the assessee's office.

JOTTINGS AND CUTTINGS.

The Fifth Freedom.—In a broadcast speech on 27th April, the Lord Chancellor referred to a recent speech by Hitler to the effect that there was now no law in Germany except his own will and whim. He said that Hitler, having already appointed himself Commander-in-Chief of the Army, Head of the State and Supreme War Lord, had announced that henceforward he was to be Supreme Law Lord into the bargain, and that everyone must take warning not to offend against the one and only law in Germany, which was himself. It seemed to Viscount Simon that, although this latest claim was all of a piece with what Hitler had been doing all along, it brought out in a very striking way the true nature of a totalitarian state, and emphasised one of the reasons why free men and women must fight against it, at whatever cost, to the very end. In addition to the four freedoms laid down by President Roosevelt, his lordship said that there was a fifth freedom without which no country could truly claim to enjoy liberty. That was the freedom of every citizen to appeal to the law and the courts to protect him from injury or insult, even though the wrong was committed by the misuse of official power. In this country the writ of *habeas corpus* had not been suspended. Defence Regulations imposed extra duties and liabilities and restricted in various ways the free choice which was part of our daily practice in times of peace. But Defence Regulations were all made under the authority of an Act of Parliament, and were liable to challenge by Parliament after they were made. Judges and magistrates in this country administered the law without fear or favour, and there was no power on earth which could direct them to act otherwise than in due course of law. His lordship pointed to the contrast under the system of government which the Nazis and Fascists were trying to force on the world. Who-ever heard of anybody in a German concentration camp applying for a writ of *habeas corpus*? Whoever heard of anyone in Germany to-day taking proceedings against the secret police or suing the Gestapo for damages? The truth was, his lordship concluded, that these 80,000,000 or 90,000,000 Germans were living as slaves because there was no German law to protect them, and because there was no

German court that would dare to interfere with the edict of the bullies in power.—*S.J., 1942, p. 127.*

Style's Preface to his Reports.—William Style in his preface to his volume of Reports dated the 17th May, 1658, wrote: "It may be objected that the press hath been very fertile in this our age and hath brought forth many, if not too many births of this nature. I must confess this truth; but how legitimate most of them are let the learned judge decide. This I am sure of, there is not a father alive to own many of them . . . What I have presented you with is, though a homely yet a lawful issue and I dare call it my own and that, I believe, I may do with as good a right as any ever might a work of the like nature, having had as little, if not less, assistance from others in the bringing it forth as any that have travelled in this kind before me."—*S.J., 1942, p. 139.*

Legislation by Reference.—A spirited correspondence in the columns of *The Times* has revived the controversy with regard to legislation by reference. The challenge was thrown down by Mr. A. P. Herbert, M.P., in a letter to *The Times* of 19th May, in an explanation of the objections which he raised in the House of Commons to the drafting of the Pensions (Mercantile Marine) Bill. He wrote that the charge against this and many similar compositions was not that any particular passage defied understanding after due research and study, but that the whole structure was designed in the fashion of a cross-word puzzle. The Bill embodied and extensively amended three sections of a Pensions Act of 1939, and some mental scissors and imaginary paste had to be used to fit the two Acts together. Mr. Herbert asked why the sections should not be printed as amended in the Bill. He said that the present method was economical neither in paper nor in time and quoted a particularly verbose and unintelligible part of the Bill to prove his point. There were fifty lines like that in the Bill, besides forty-five lines of consequential amendments. If a judge wished to answer the question: "Is a sailing barge a ship?" three volumes of the Statute Book must be assembled on his desk. Mr. Herbert referred to a recent speech in which the Leader of the House spoke of the need to bring our democratic methods up to date, and he suggested that as an act of grace the Bill should be withdrawn for re-drafting during the Whitsun recess. On the following day *The Times* published a letter from Major Donald Anderson, in which he stated that the Government of Australia had begun drafting Bills in intelligible English many years ago, and Acts such as that governing the pay and employment of sheep shearers, which had to be hung in every shearing shed, could be understood by the least educated, and the draftsmen even used slang. In a letter to the same paper on 21st May Prof. H. A. Smith added that almost every new law was usually followed by voluminous circulars which attempted to explain the law to those who had to administer it, with enormous resultant waste. Nothing but a bad tradition, he wrote, prevented our legislation from being expressed in lucid and literary form. Such was the actual practice of other countries, and the writer knew from experience that foreign laws could be translated into English which was as clear as the original. "In our language," he wrote, "we possess an instru-

ment which is unrivalled in its delicate precision, but the instrument has been grossly misused." He added that in several American States the practice of legislation by reference was prohibited by the State Constitutions. A letter from Mr. C. H. Gray in *The Times* of 22nd May put the other point of view with regard to legislation by reference and gave an example where it would be necessary to use thirty words to avoid reference. On the following day Mr. P. J. H. Unna wrote to *The Times* quoting section 25 (1) of the Finance Act, 1936, as an example of the unintelligibility caused by legislation by reference. Most lawyers who have had experience of the horrible task of attempting to fit together what is often more of a jig-saw puzzle than a cross-word puzzle of legislation by reference will thoroughly endorse Mr. Herbert's complaint. With regard to the kindred complaint that statutes are not written in plain English, the matter is not so clear. It may be remembered that no less an authority on the writing of English than our present Prime Minister stated on 27th May, 1941, in the House of Commons that official jargon was used, not with a view to causing inconvenience, but because those who had been entrusted with expressing the views and decisions of the House in statutory form had found that the most convenient and precise method (85 S.J. 249). Professor Julian Huxley also, who may be regarded as an authority on scientific expression, recently added his voice in support of technicality in legal expression, with a view to attaining precision (*ante*, p. 121). With regard, however, to excessive legislation by reference, the issue, we submit, can be in no doubt.—*S.J., 1942, p. 149.*

THE
MADRAS LAW JOURNAL.

II] OCTOBER [1942

THE PROVISO TO SEC. 47, INDIAN ARBITRATION ACT—A CASE FOR REPEAL

BY

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There are two reasons why, the above provision of law should be repealed; firstly, because, it embodies a wrong principle of jurisprudence; and, secondly, even in so far as it goes, it is wholly innocuous and will fail to achieve the purpose it was intended to subserve.

To take the second reason, first: Section 47 of the Arbitration Act declares that all arbitrations, shall, subject to the provisions of *section* 46, be governed by the provisions of the Act. The proviso under notice engrafts an exception on this rule and states that notwithstanding the fact that the procedure laid down in the Act has not been followed, the Court may, still, "take into consideration" an arbitration award otherwise obtained, for the purpose of passing a decree within the meaning of rule 3 of Order 23 of the Code of Civil Procedure which was, obviously, in the mind of the draftsman. The proviso goes on to add a rider, *viz.*, that, in such cases, the consent of all the parties is necessary. Now, it is obvious that this requirement robs the exception of much of its utility. No party who is dissatisfied with the award can be expected to consent, and, if there is no unanimous consent, the Court will be powerless to act, however just it might consider the award to be. This is virtually to produce a stale-mate. If the Legislature was anxious to give due effect to awards, under whatever circumstances they might have been made, the only way of effectuating that object would have been to give the Court power to act under rule 3 of Order 23, if only, it was satisfied as to the desirability, thereof. So early as 1908, under similar circumstances, the Legislature solved a similar problem by enacting that consent of parties was not necessary to enable the Court to pass a decree on the basis of an adjustment; only, it had to be satisfied that there had been, *de facto*, an adjustment. This was, obviously, if one may say so, good sense and this put it out of the power of parties to resile from concluded agreements. This experience has been entirely ignored in the present proviso which as it stands

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makes the Court powerless. It would be difficult to find any similar instance of such frustration of legislative effort. If the provision was to be effective, the words "with the consent of the parties" occurring in the section must have been omitted.

But, then, is that objective desirable?. This takes us to the first of the considerations adverted to. The principle contained in the proviso is not desirable, and, for the following reasons. It is true that arbitrations are no longer regarded by Courts with disfavour. As Lord Hailsham observes, in the course of his Foreword to Hogg on Arbitration, "....arbitration is now recognised and encouraged as a most valuable assistance to the Courts. Instead of prohibiting the practice of arbitrations, as attempts to oust the jurisdiction of the Court, the law has lent its sanction for the enforcement of awards and for the assistance of their procedure". It is enough to state that, under the English Law, the one principle that is emphasised, alike in the statute-law, as in the decisions of the Court is the supremacy of the King's Courts. Throughout all the legislative enactments in England, the Common Law Procedure Act of 1854, and the Arbitration Acts of 1889 and 1934, this principle is loudly proclaimed. Section 4 of the English Act of 1889, like its precursor, section 11 of the Common Law Procedure Act of 1854 emphasises this principle in unmistakable language. The high watermark is reached in the case of *Doleman* v. *Ossett*,[1] where, in spite of some phrases of doubtful import employed by Farwell, L.J. the decision, itself leaves no doubt on the matter and was, in fact, assented to, even by Vaughan Williams, L.J. At page 269 of the report, Fletcher Moulton, L.J. observes, "There cannot be two tribunals each with jurisdiction to decide on the rights of the parties and compel them to accept its decision....there would be thus, a race....which should be the first to give its decision." Farwell, L.J. is even more emphatic. He says: "The King's Courts do not compete with arbitrators, or, permit their proceedings to be interfered with in any way by them." It will be permissible to add: "The King's Courts *do not care*, to compete" The latest trend of English authority is to be found in the case of *Pinnock & Bros* v. *Lewis & Peat, Ltd.*, a decision of Roche, J.[2] It is important to note that there is no authority in English Law which would countenance an award rendered *pendente lite*, on a reference made, also, pending action, and without the sanction of the Court.

The history of Indian Jurisprudence has, also, not been different. The earliest case of the Privy Council dealing with arbitrations is that in *Pestonjee Nussurwanjee* v. *Manockjee and Co.*[3]. It is true that in a very early Indian enactment —Bombay Regulation, VII of 1827—parties were enabled to enter into an arbitration agreement *pendente lite*, and without the intervention of the Court: see Section 1, clause 2. But, this heterodox doctrine was departed from, ever since the Civil Procedure Code of 1859, and has been rejected, down to the present Code. The Indian statute-law, like the English statute law does

1. (1912) 3 K.B. 257.
2. (1923) 1 K.B. 690.
3. (1868) 12 M.I.A. 112, 131.

not countenance attempts by parties to a litigation before Courts to enter into a private reference. The Indian Codes of 1859, 1882, and 1908, declare the supremacy of the established tribunals of the land and of their authority and power to have exclusive cognisance of all civil disputes between His Majesty's subjects, except, when declared, otherwise, by any other law: *See.* S. 9 of Act V of 1908. *See also* the Indian Arbitration Act of 1889.

Before the present Arbitration Act was enacted, there was a sharp difference of opinion between the Indian High Courts on the question whether the Court can recognise, under rule 3 of Order 23, of the Code, awards made, *pendente lite*, on a private reference also, entered *pendente lite*. The majority view, unfortunately, took the view that the Courts can; see *Chanbasappa* v. *Basalingayya*,[1] *Subbaraju* v. *Venkataramaraju*,[2] *Gajendra Singh* v. *Durgakunwar*[3]; contra, *Amar Chand Chamaraja* v. *Banwarilall Rakshit*[4].

In the proviso under notice, the Legislature has expressed agreement with the majority view. The writer has discussed, elsewhere, in detail, why the majority view is wrong[5]. The effect of the present proviso is to enable parties to set at naught, at their pleasure, the established tribunal of the land which has legitimate cognisance of their case and to erect, without permission, another "lay" tribunal with power to adjudicate on their rights, and, after that, to come to Court asking for its imprimatur on the award made under such singular circumstances.

It is enough to say in the words of Farwell, L.J. in *Doleman* v. *Osset*,[6] such a position is an "impossible one, inconsistent with the dignity of the Court." The present Act, itself, emphasises the principle of the supremacy of the King's Courts in a fasciculus of sections: *see* especially sections 34 and 35. Even the very proviso which makes such a disastrous concession, itself, gives the Court power to refuse its sanction even when all the parties consent. No citizen who is subject to the discipline of the Courts and *ex concessio*, has his case taken cognisance of by the Court can, after that event, be allowed to ignore it, for a moment, and, then, to come to it, again, for getting its seal of approval. The King's Courts ought not to be placed in so equivocal a position. And a provision of the statute which permits such a thing to be done has therefore to be abrogated. The whole scheme of the Indian law has been against such a position, at least, ever since 1859. It was Rankin, C. J. who observed "Informal and uncontrolled arbitrations...are the very things which the II Schedule (of the Code) was intended to deliver litigants from", *see Amar Chand Chamaraja* v. *Banwari Lall Rakshit*[4].

These words strike a genuine note of jurisprudence and are worth pondering over. Will the Legislature reconsider the matter and repeal the Proviso?

1. (1927) I.L.R. 51 Bom 908 (F.B.)
2. (1928) I.L.R. 51 M. 800 (F. B.)
3. (1925) 47 All. 637 (F.B.) 4. (1921) I.L.R. 49 Cal. 608.
5. *See* 65 M. L. J. Journal section, pp. 1-18.
6. (1912) 3 K.B. 257, 270—274.

SUMMARY OF ENGLISH CASES.

PLOMIEN FUEL ECONOMISER CO., LTD. *v.* NATIONAL MARKETING CO., (1941) 1 All. E. R. 311 (Ch. D.)

Evidence—Plaintiff's employee's 'proof' of evidence—Death of witness—Proof not admissible as witness was party interested.

A proof of evidence taken from an employee of the plaintiff while proceedings were pending, cannot on his death be admissible in evidence, as he was a party "interested" in the proceedings within the meaning of the Evidence Act, S. 1 (3).

DOLMAN *v.* HILLMAN LTD., (1941) 1 All. E. R. 355 (C. A.).

Tort—Nuisance—Butcher's shop adjoining highway—Piece of fat escaping on to pavement—Plaintiff slipping on it and injuring himself—Right to damages.

The plaintiff fell and was injured by slipping on a piece of fat on the pavement. The piece of fat in question came from the defendant's (a butcher's) shop. The piece of fat came there by jumping out on the pavement as the result of a chopping or slicing operation conducted inside the shop.

Held, that the defendants were guilty of negligence in the circumstances and liable for the nuisance.

LONDON ARMOURY CO., LTD. *v.* EVER READY CO. (GREAT BRITAIN) LTD., (1941) 1 All. E. R. 364 (K.B D.).

Trade Marks—Merchandise Marks Act (1926), S. 1—Imported goods bearing trade mark without indication of place of origin—No civil remedy available against the manufacturer—Criminal prosecution, only remedy.

The only remedy of an importer against the manufacturers for a breach of the provisions of the Merchandise Marks Act 1926, in failing to indicate the place of origin of imported goods bearing trade marks is by way of prosecution in a court of summary jurisdiction. No action for breach of statutory duty was maintainable.

BENSON *v.* NORTHERN IRELAND ROAD TRANSPORT BOARD (1942) 1 All. E. R. 465 (H.L.).

Criminal trial—Acquittal by court of summary jurisdiction "final"—Order for costs against prosecutor—If makes prosecutor a person aggrieved who could appeal—Order for costs—If one for payment of "penal or other sum."

Practice—Jurisdiction—Objection not taken—Duty of court.

When a court of summary jurisdiction dismisses a criminal charge, the order is final and the imposition of costs on the prosecution cannot create a right of appeal against such acquittal.

The order for costs cannot be said to be an order "for payment of any penal or other sum" within the meaning of that

phrase in The Summary Jurisdiction and Criminal Justice Act Northern Ireland, 1935, S. 24 (1) so as to make the order appealable.

If a court is itself satisfied that it has no jurisdiction, to entertain a case it is its duty to give effect to that view, taking if necessary the initiative upon itself.

GATWARD *v.* GATWARD, (1942) 1 All. E. R. 477 (P. D. A.)

Divorce—Desertion—Separation and maintenance order with non-cohabitation clause—Deletion of clause subsequently—If reconstitutes desertion.

The deletion of a non-cohabitation clause from a separation and maintenance order after it had been in full force for many years cannot automatically reconstitute desertion. There must be other evidence of overtures on the wife's part towards a resumption of cohabitation or of the husband's conduct to explain her not making any.

RE AMAND, (1942) 1 All.E.R. 480 (C.A).

Criminal Practice—Conscription by allied Government in England—Deserter—Arrest—Dismissal of application for issue of writ of habeas corpus*—Appeal incompetent as one relating to criminal matter.—Supreme Court of Judicature Act, 1925, S. 31.*

The dismissal of an application for the issue of a *writ of habeas corpus* by a person arrested as a deserter after conscription by an allied Government established in England, is an order on a criminal matter and an appeal is accordingly incompetent under the Supreme Court of Judicature (Consolidation) Act, 1925, S. 31.

DAWSON *v.* MUREX LTD., (1942) 1 All. E.R. 483 (C.A).

*Tort—Factory—Accident due to patent defect in lifting tackle —Men engaged on the job at the time not called as witnesses— Evidence of expert witnesses—*Value.

In an accident case the plaintiff is not called upon to prove precisely how the accident happened. Where neither side called any of the men engaged on the job when the accident, due to defect in the lifting tackle, took place in a factory and both sides relied on expert evidence, if the plaintiff's explanation is the more probable one, the Court can accept his case and find in his favour.

(1941) 2 All.E.R. 784 (affirmed).

MORGAN *v.* AYLEN, (1942) 1 All.E.R. 489 (K.B.D).

Tort—Negligence—Escort of child running into highway to save the child from danger—Injury from on-coming motor cycle —Contributory negligence—If can be defence.

A child escorted by the plaintiff ran forward to cross the road. The defendant at that moment was coming along on his motor cycle at a speed exceeding 23 miles per hour. Plaintiff ran out to save the child from being struck by the motor cycle. The defen-

dant cleared the child but struck the plaintiff and injured her. In a claim for damages,

Held, in the circumstances, the initial wrong was on the defendant who was approaching the cross road at too great a speed and was in law solely responsible for the accident. What the plaintiff did was a natural and proper thing to do and there was no contributory negligence on her part. The plaintiff was therefore entitled to damages.

CENTURY INSURANCE CO. LTD. *v.* NORTHERN IRELAND ROAD TRANSPORT BOARD, (1942) 1 All.E.R. 491 (H.L).

Tort—Negligence—Master and servant—Petrol tanker delivering petrol at garage—Driver lighting cigarette and throwing away match which started a fire—If act in course of employment.

The respondents were insured by the appellant company against liability to third parties arising from damage to property caused by the use by them of a petrol tanker belonging to the respondents. On Aug. 2, 1937, this tanker which was being driven by their employee, one *D*, had taken on board a consignment of 300 gallons of petrol at the Larne depot of Holmes Ltd. for delivery into the storage tank of one Catherwood, a garage proprietor of Belfast. *D* drove the tanker to Belfast backed it into Catherwood's garage, inserted the nozzle of the delivery hosepipe into the manhole of Catherwood's tank and turned on the stopcock at the side of the tanker into the tank. *D*, lighted a cigarette and threw away the match. The match ignited some material on the floor of the garage and a fire was caused forthwith where the nozzle of the delivery hose was discharging into the tank. The tanker was destroyed by an explosion. An adjoining house and a car were also destroyed and respondents had to pay damages. In a claim on the insurance it was contended that *D* was the servant of Holmes & Co. and not of the respondents by virtue of an agreement between them which provided *inter alia*, that all the employees of the respondent engaged in or about the delivery of petrol should accept and obey the orders of Holmes & Co, regarding such delivery, the payments of accounts and all matters incidental thereto, and that the respondents should dismiss any employee disregarding or failing to obey such orders. In the clause there followed a proviso that nothing in the clause should be taken as implying that such employees were in any way the employees of Holmes & Co.

Held: (i) The terms of the contract between the respondents and Holmes & Co did not involve the transfer of '*D*' to the service of Holmes & Co; (ii) the negligent act of *D* which caused the fire was done in the course of his employment by the respondents; and (iii) the respondents were accordingly entitled to claim from the appellants under their policy.

ROBINSON *v.* BAILEY, (1942) 1 All.E.R. 493 (Ch. D.)

Practice—Judgment—Debt not immediately payable—Property of value proportionate to debt to be charged.

Even though a debt is not immediately payable the court has jurisdiction to make a charging order in respect of it. But such

jurisdiction must be exercised with the greatest care, as a charging order for a debt not immediately payable is a form of execution. It will not be a proper exercise of jurisdiction to lock up a disproportionate amount of property to satisfy a small debt by reason of the apprehended failure of defendant to satisfy the terms of a judgment.

R. *v.* Keeling, (1942) 1 All. E. R. 507 (C.C.A.).

Criminal trial—Charge of having carnal knowledge of a girl of 8 years—Only evidence that of victim—Prisoner's silence—If can be deemed to be corroboration.

In a charge of having carnal knowledge of a girl of eight the only evidence was that of the victim and by virtue of the proviso to S. 38 of the Children and Young Persons Act, 1933, it was essential as a matter of law that the evidence should be corroborated by other material evidence. The conduct of the accused in not denying the charges in the following circumstances was relied on as affording the necessary corroboration. The circumstances were:—The police inspector saw the prisoner in the street and cautioned him in the usual way. He told him that he was not bound to make any statement and that he had a warrant for his arrest for having had carnal knowledge of *K* aged 8 years. To that the prisoner replied "I know what you mean, but not likely. She plays with the Sawbridge girl". The same evening the warrant was again read over to the accused who having been told that he need say nothing answered. "I have got you. Nothing to say". Again at the hearing before the Magistrates, after being cautioned that he was not obliged to say anything and that whatever he said would be taken down and given as evidence in the trial, he said "I am not guilty. I am going to say nothing." Lastly at the trial before the Judge having had the advantage of counsel's advice, he did not go into the witness box to give evidence.

Held, the conduct of the accused in the circumstances did not afford the necessary corroboration to support a conviction.

Re Ward, (1942) 1 All. E. R. 513 (Ch. D.).

Bankruptcy Act (1914), *S.* 69—*Surplus assets after payment in full to proving creditors—If can be subjected to a charging order in favour of creditors who did not prove.*

The word "creditors" in S. 69 of the Bankruptcy Act must be read as meaning only creditors who have proved in the bankruptcy and not those who after notice do not come in and prove their debts in the bankruptcy. Therefore, on all the creditors who have proved in the bankruptcy being paid in full with interest and costs, the balance of assets in the hands of the trustee is held in trust for the bankrupt and consequently is a fund in respect of which a charging order can be made at the instance of a non-proving creditor who had obtained a judgment after the adjudication of the bankrupt.

TRUSTEE IN BANKRUPTCY *v.* BOWRING HANBURY, (1942) 1 All. E. R. 516 (Ch. D.).

Limitation—Acknowledgment—Debt mentioned by debtor in Inland revenue affidavit and statement by debtor's solicitor to trustee in bankruptcy of creditor—If acknowledgment.

In June 1929 Mrs. B. H. repaid, out of the £10,000 lent to her, by her 'husband B. H. the sum of £1000. She died on March, 17, 1931 having by a will dated October 16, 1918 appointed her husband (B.H.), the defendant, her sole executor, and having after giving specific legacies and a pecuniary legacy, devised all the residue of her real and personal estate to the defendant absolutely. In his application for probate the defendant swore the usual Inland revenue affidavit in which he gave particulars of the estate of the deceased and in the list of debts due by the deceased was included the sum of £9000 due to B. H. (the defendant), Probate of the will was granted to the defendant on May 20, 1931, and on March 14, 1935 he was adjudicated a bankrupt. Thereupon this debt due to him from his wife vested in the trustee in bankruptcy. In June 1936 the solicitor for B. H. acting in his capacity as executor, wrote a letter to the trustee in bankruptcy mentioning with a statement of account that there was a possible claim for the £9000 the balance of the loan he had made to the deceased. In an action by the trustee in bankruptcy, *Held,* that the debt was time barred and neither the affidavit for probate nor the solicitor's letter constituted an acknowledgment of the debt as neither of them was made to the creditor or his agent nor did either of them constitute a promise to pay.

COPPIN AND OTHERS *v.* BUSH, (1942) 1 All. E. R. 516 (Ch.D.).

Practice—Collision case—Defendant and essential witness serving overseas in the war—If action to be stayed till their return.

A lorry driven by the defendant, an army driver in charge of it collided with a car belonging to one of the plaintiffs and carrying *C* and some friends or relatives who were with him. In an action by *C* and other persons injured in the accident, the Treasury Solicitor ultimately entered appearance for the defendant who was on active service abroad and asked for stay on the ground that the defendant and a material witness were out of jurisdiction on service.

Held, that the delay caused by such stay till return to England of the defendant and the witness will hold up the action indefinitely and was likely to cause grave injustice to the plaintiffs, and that accordingly such a stay should not be ordered.

ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE CO., LTD. *v.* MORRISON AND OTHERS, (1942) 1 All. E.R. 529 (C.A.).

Insurance—Misrepresentation or concealment of a material fact—Effect—Road Traffic Act (1934) *S.* 10.

Under the general law of insurance an insurer can avoid a policy if he proves that there has been misrepresentation or concealment of a material fact by the insured. What is material is that which would influence the mind of a prudent insurer in deciding whether to accept the risk or fix the premium. If this be proved, it is not necessary further to prove that the mind of the actual insurer was so affected. But under S. 10, Road Traffic Act (1934) the general law is modified and the insurer if he wishes to avoid the policy must establish (1) that the matter relied on was "material" in the sense that the mind of a prudent insurer would be affected by it, and (2) that in fact the underwriter's mind was so affected, and the policy was thereby obtained.

RE SMITH & FAWCETT, LTD., (1942) 1 All. E. R. 542 (C.A).

Companies—Shares—Transfer of shares—Refusal to register—Tests of bona fides.

Where the articles of association of a company confer a discretion on directors with regard to the acceptance of transfers of shares, the directors must exercise their discretion *bona fide,* in what they consider—not what a court may consider—to be in the interests of the company and not for any collateral purpose. A court will be averse to drawing inferences as to the *bona fides* or *mala fides* of persons merely on affidavit evidence. Where the directors have *bona fide* considered the interests of the company and come to the conclusion that it would be undesirable to register the transfer of some shares, the court cannot interfere.

MUMMERY *v.* MUMMERY: (1942) 1 All.E.R. 553 (P.D.A.)

Divorce—Desertion—Resumption of co-habitation—When interrupts statutory period.

The mere fact that marital relations between the spouses had taken place since the desertion does not constitute conclusive evidence of resumption of co-habitation so as to condone desertion and bring it to an end.

R. *v.* THE GENERAL MEDICAL COUNCIL: (1942) 1 All.E.R. 568 (K.B.D).

Medical Council—Erasure of name from register on the ground that member was found by Court guilty of adultery—Council if bound to hear other evidence in the inquiry.

The Medical Act (1858), S. 29 required a "due inquiry before the erasure of the name of a member from the register of the Medical Council. The Council on the finding of the Divorce Court that a member was guilty of adultery removed his name refusing to hear other evidence adduced by him.

Held, (Singleton, J., dissenting) that the refusal did not prevent there being "due inquiry" as required by the Act. The Council was entitled to accept the finding arrived at after full investigation by a competent court without any fresh hearing.

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RE: WOOLGAR, WOOLGAR *v.* HOPKINS: (1942) 1 All. E. R. 583 (Ch. D).

Executor—Administration action—Arrears of alimony due to widow—If recoverable in administration action.

Arrears of alimony due to the widow are not recoverable in the administration of the deceased's estate and the widow cannot therefore maintain an action for administration.

JOTTINGS AND CUTTINGS.

Dock Briefs.—Work must have been plentiful at the Surrey Quarter Sessions at Kingston, since the appearance of a prisoner asking for a dock brief caused a general exodus on the part of the barristers present, leaving him only two to choose from. When the other counsel returned, the chairman observed that the retreat was not in accordance with the best traditions of the Bar, but a spokesman on their behalf relied on a ruling by the late Recorder of London and added that senior men went out of Court to give their juniors a chance to accept dock briefs. Perhaps they were also afraid of forming undesirable acquaintances. Lord Justice Bankes, at his farewell dinner in Inner Temple Hall, recalled how once when he was staying in the country with his father-in-law a ragged man at the kitchen door greeted him with: "How do you do, Mr. Bankes?" and added "Don't you remember that little affair with the fowls at Crewe?" He was a dock brief client from the long distant past. Sir Harold Morris, K.C., recalled his first dock brief at the Old Bailey, which was "Hobson's choice" for the prisoner, as the only other barrister in court was going to prosecute. The charge was stealing a pair of boots, and assisted by his client's pronounced stammer he got him off on the ground of mistaken identity. Afterwards he noticed that one of the coins constituting his fee was a half franc piece. The presence of lady barristers introduces more confusion into the dock brief lottery and a little while ago at the Old Bailey two prisoners running said: "I'll have that gentleman," pointing to a lady.—*S.J., 1942, p. 173.*

The Brains Trust Again.—In its session on 9th June the "Brains Trust" was called upon to give its impromptu opinion on two legal matters one a matter of opinion and the other a matter of fact. The first arose out of a question whether a simplified statute book or every man's lawyer could be devised, for the "Man in the street" to understand. One member of the trust thought that Haldane's (*sic*) "Laws of England" fulfilled the necessary requirements, but was careful to point out the dangers of over-simplified law which have often been stressed in these columns. Sir William Beveridge was not at all hopeful of the possibility of reducing the laws of England into the compass of a single book. Human life, he said, is not simple; it is complicated. "Good is one but evil is multiform," and Sir William said that you cannot have a simple statement of law which does not cause greater trouble than it is worth. He said that the Citizen's Advice Bureaux fulfilled a need in this respect, and another speaker mentioned the

"Poor Man's Lawyer," There are, in fact, several small books in existence, such as Professor Geldart's "Elements of English Law," the late Professor Jenks's "Book of English Law", and an excellently simple work by the late Judge Ruegg, which can form the ground-work for a layman's painful first steps in comprehending the law of the country in which he lives. The extent of the ignorance of the average layman of matters which are commonplace knowledge among lawyers was illustrated by the answers of the "Trust" to a question put by a person who had recently been called to serve on the jury at the Central Criminal Court. He was anxious to know what different functions the High Court Judge, the Recorder, the Common Serjeant and the Judge of the City of London Court fulfilled at that Court. The Trust hazarded what the question master called a number of brilliant conjectures in which the general view seems to have been that each Judge was a specialist in his particular field. The facts are that all the four Judges have technical equality in jurisdiction under S. 2 of the Central Criminal Court Act, 1834, which they share with several other dignitaries, such as the Lord Mayor of the City of London, the Lord Chancellor, the Dean of Arches, the Aldermen of the City of London, and ex-Lord Chancellors and ex-High Court Judges. As a matter of practice, the High Court Judge tries murder, manslaughter and certain other serious cases, while the Recorder, theCommon Serjeant and the Judge of the City of London Court, who alone try the other cases, have no special tasks allotted them. The Judge of the City of London Court is usually referred to as the Commissioner, and he, like the Common Serjeant and the Recorder, is paid by the City Corporation. The story goes that Mr. Commissioner Kerr, the first Judge of the City of London Court to be so appointed, was at first paid ten guineas a day for his work, but when the work increased he demanded and received a salary of substantial proportions. This continued although the work fell off, but when it increased again, Mr. Commissioner Kerr asked for and received a further increase of salary. This Judge evidently knew his worth and valued his words accordingly, his typical summing up being, "Ye've heard the evidence. Consider your verdict!" The Judges of the Old Bailey today are of a different calibre and deserve to be better known.—*S.J., 1942, p. 177.*

To-day and Yesterday.—On the 7th July, 1869, Sir Hardinge Giffard (afterwards Lord Halsbury) appeared at Marlborough Street Police Court to defend Lord Carrington, charged with assaulting Granville Murray, editor and proprietor of a scandalous journal called "The Queen's Messenger," which had published an abominable libel on his father. The Earl had publicly horsewhipped Murray and now set out to prove that he was the actual author of the article, After much conflicting evidence the magistrate announced an adjournment. Immediately some of Murray's friends made a rush for a box alleged to contain manuscripts stolen from the paper's offices. "Around that box there raged for nearly a quarter of an hour a fight as fierce and fell as that for the body of Patroclus . . . Noble lords, eminent Queen's Counsel, solicitors, clerks, witnesses to the number of thirty or forty were engaged in that desperate melee

. . . Hats were smashed, eyes blackened, noses set bleeding, glasses broken, inkstands hurled to and fro till at last a strong body of police quelled the riot." Sir Hardinge Giffard fought vigorously in the thick of it while the magistrate watched horror stricken from the Bench.—*S.J., 1942, p. 194.*

BOOK REVIEWS.

"THE MIND AND FACE OF NAZI GERMANY", by Prof. N. Gangulee, (John Murray, 5s.),

The book under review presents in the very *ipse dixit* of the Nazi protagonists a grim picture of the soulless philosophy which, crushing all perennial moral values as under a juggernaut wheel, and snuffing out altogether the eternal verities of existence, has made the Germany of today the horror of the entire civilized world. National Socialism, under the baleful influence of which the garnered fruits as well as the potential germs of the unfettered human spirit are sought to be sacrificed on the altar of an insensate megalomaniac ambition, is here described in all its ramifications.

As Dr. Wellington Koo has observed, the book gives a composite picture of the thoughts and beliefs, the ideas and ideals, the aspirations and ambitions of the Nazi hierarchy in Germany.

One shudders to read statements like the following: "God has manifested itself not in Jesus Christ but in Adolf Hitler," "Let Christ rot—and the Hitler Youth march." One rubs one's eyes and wonders whether Anti-Christ has not come out into open at last.

It will be a revelation to many to find that the German-Nordic religion is a direct unblushing negation of the doctrines of the Church. "Conscience is a Jewish invention" and "Mercy is an un-German conception"!

The pervasive features of Nazidom—its absurd myth of race-superiority, its unthinking anti-Semitism, its eradication of all human values, its glorification of war, and its "antiquarian gospel of malignant tyranny"—all these are well portrayed in the very language of its hierophants.

It is indeed a happy inspiration of the author to present the matter in the shape of an anthology, for there can be no more crushing indictment of Nazism than that its protagonists stand condemned out of their own mouths.

"INDIAN COMPANY RULES AND FORMS", by Lakshmi Narain Mehra.

This handy little book brings to the reader in compact form the latest rules under the Indian Companies Act, and a number of new forms useful for people who have anything to do in connection with companies. The budding company director will find in this book an easy *vade mecum*. The footnotes furnish very practical hints, and give helpful information on the day-to-day routine of company management.

THE MADRAS LAW JOURNAL.

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COPARCENERSHIP OF DISQUALIFIED SON UNDER THE MITAKSHARA.

By

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When Colebrooke translated the Digest of Jagannatha and later the Mitakshara and the Dayabhaga, he borrowed the term *coparcener* from English Law for the purpose of describing the members of a joint family who are entitled to demand partition of the family property. In some places he used the old form, *parcener.*[1] In some places he used the more familiar term *coparcener*[2] which has now definitely established itself in the English vocabulary of Hindu Law. It is clear that he had no intention of importing into Hindu Law the technical English idea of coparcenary, for coparcenary never arises under English Law except under a joint inheritance, but joint descent is not a necessary condition of co-ownership of joint family property under Hindu Law. The essential connotation of the term, so far as Colebrooke was concerned, lay in the right to demand partition, the object being to distinguish shareholders in the joint family estate from the inferior category of members who are merely entitled to maintenance. It is certain that Colebrooke had no intention of associating the idea of coparcenary with the special incidents of joint family relationship under the Mitakshara, for he used the term in various places in his translation of the Dayabhaga also.[3]

In course of time, precisely how and when it is unnecessary now to consider, the term *coparcener* and its variants came to acquire a special affinity with the rule of survivorship under the Mitakshara law. In a well-known passage in the judgment of the Privy Council in the *Shivaganga case*[4], Lord Justice Turner says:

"There is coparcenership between the different members of a united family and survivorship following upon it."

1. Colebrooke's Digest. Book V, Placita 367, 376, 377, 394.
2. ,, ,, Placitum 391.
3. Dayabhaga, Colebrooke's translation, Ch. VI, S. 1, Placita 7, 26, 27, 30, 31, 37, 39; Ch. VI, S. 2, Placitum 13; Ch. VII, S. 2, Placitum 4; Ch. XI, S. 1, Placita 29, 30.
4. *Katama Nachiar* v. *Raja of Shivaganga,* (1863) 9 Moo. I.A. 539, 615.

The change in the meaning of the term *coparcener* is interesting. Under English Law coparcenary is sharply differentiated from joint tenancy. The former never arises except under a joint inheritance. The latter never arises except under a joint grant. In coparcenary there is no right of survivorship, but the *jus accrescendi* is the distinctive feature of a joint tenancy. It is true that Colebrooke's coparcenary is not the same as the coparcenary of English Law, but Colebrooke applied the idea of coparcenary to both schools of Hindu Law. In blending coparcenary and survivorship, therefore, the judgment in the *Shivaganga case* was taking a term imported from English Law by Colebrooke but giving to it a meaning which differs both from Colebrooke and the English Law.

The judgment in the *Shivaganga case* was in 1863. Five years later, in the judgment of the Privy Council in *Bhugwandeen Doobey* v. *Myna Baee*[1] another development emerges in the connotation of the term *coparcener*. Sir James Colville, in his judgment in this case, says:

"The estate of two widows, who take their husband's property by inheritance is one estate. The right of survivorship is so strong that the survivor takes the whole property to the exclusion even of daughters of the deceased widow. They are therefore in the strictest sense coparceners and between undivided coparceners there can be no alienation by one without the consent of the other."

The reference to *coparceners* in this case, even though there was no question of a joint family, was a complete departure from Colebrooke. Coparcenary and joint tenancy have here become practically synonymous. Further a new element has come in, that coparcenary property cannot be alienated by one coparcener without the consent of the others. This emphasises the deviation from Colebrooke strikingly, for Colebrooke recognised coparcenary under Dayabhaga law and under Dayabhaga law one coparcener can alienate his share without the consent of the others.

Has Sir James Colville's conception of *coparcenary* been maintained in later cases? Clearly not, for the proposition enunciated by him is flatly contradicted by the law relating to impartible estates.

There was a tendency until comparatively recently to deny the possibility of coparcenership in impartible estates. It was categorically asserted, for instance, in *Rama Rao* v. *Rajah of Pittapur*[2] when the Privy Council was still under the spell of *Sartaj Kuari's case*[3] that impartibility is the inevitable negation of coparcenership. But this view has now been abandoned. In *Konammal* v. *Annadana Jadaya Gounder*[4], Sir John Wallis says:

"The *Betia raj case* contains observations denying that the junior members of the family have any coparcenary interest in the impartible estate even for purposes of succession, but these observations have been explained in Lord Dunedin's judgment in *Baijnath Prasad* v. *Tej Bali Singh*.

1. (1867) 11 Moo. I.A. 487, 515, 516.
2. (1918) 35 M.L.J. 392: L.R. 45 I.A. 148: I.L.R. 41 Mad. 778, 783 (P.C.).
3. (1888) L.R. 15 I.A. 51: I.L.R. 10 All. 272 (P.C.).
4. (1927) 54 M.L.J. 504: L.R. 55 I.A. 114: I.L.R. 51 M. 189, 201 (P.C.).

Later in the *Jheria case, Shiba Prasad* v. *Rani Prayag Kumari*[1], Sir Dinshaw Mulla says:

"Though the other rights, which a coparcener acquires by birth in joint family property, no longer exist, the birth right of the senior member to take by survivorship still remains."

What in this state of the authorities is the connotation of the term *coparcener* under Hindu Law?

The English Law association of coparcenary with joint inheritance is clearly inapplicable to Hindu Law. The notion that coparcenary is a relationship between members of a joint family, though supported by Colebrooke, is contradicted by the judgment in *Bhugwandeen Doobey's case*[2]. It is generally assumed that the right to partition and the right to restrain alienation are essential incidents of coparcenary, but any generalisation to this effect is clearly inconsistent with the law relating to impartible estates. The common tendency nowadays is to treat coparcenary as the technical description of the joint tenancy that prevails in an undivided Mitakshara family, but the usage originated by Colebrooke still persists and passages can be found in any text book on Hindu Law explaining the distinctions between coparcenary under Mitakshara law and coparcenary under the law of the Dayabhaga.

The conclusion is perfectly plain. The term *coparcener* has the deceptive appearance of a term of art, but it has really no unchangeable and unchallengeable legal connotation. Any quarrel about the meaning of this expression will be merely the old story of the chameleon, all will be right and all will be wrong. Would it not be advantageous to accept the advice given by Lord Dunedin in *Baijnath Prasad's case*[3], and avoid verbal confusion by dropping this unhappy term wherever possible, concentrating attention on the substance of whatever legal issue may be in question?

A striking commentary on the wisdom of Lord Dunedin's warning is furnished by the recent judgment of the Madras High Court in *Amrithammal* v. *Vallimayil Ammal*[4].

The dispute in this case related to a bequest. The testator Veerakumara was a member of a joint family consisting of himself and, apart from female members, his only son Chellakrishna. This son was found to be a congenital idiot, though he had enough understanding to marry and beget two sons. When the father Veerakumara died, the son Chellakrishna was a married man, but his sons were born only later. Veerakumara bequeathed his property, which was wholly ancestral, to his widow Vallimayil Ammal with absolute rights. The validity of this bequest was the crucial question in the litigation.

The suit claim was for partition of the property bequeathed to Vallimayil Ammal. The plaintiff was a daughter's daughter of Veerakumara. She claimed that her grandfather's property became the stridhana of her grandmother by virtue of the bequest, and that

1. (1932) 63 M.L.J. 196: L.R. 59 I.A. 331: I.L.R. 59 Cal. 1399, 1413, 1414 (P.C.).
2. (1867) 11 Moo. I.A. 487, 515, 516.
3. (1919) 40 M.L.J. 387: L.R. 48 I.A. 195: I.L.R. 43 All. 228, 243 (P.C.).
4. (1942) 2 M.L.J. 292 (F.B.).

she was entitled to a share in the estate as stridhana heir. This claim was untenable if the bequest to Vallimayil Ammal was not valid, for in that case succession would be traced to Veerakumara and in the circumstances of the case the daughter's daughter would have no claim to succession. Was the bequest valid?

The lower Courts had upheld the bequest. They proceeded on the footing that Veerakumara was virtually the sole owner of the properties, as the son Chellakrishna was admittedly precluded from claiming partition by his mental disability. The appeal to the High Court came up before Venkataramana Rao, J., who directed the case to be posted before a Bench. When the appeal came up for hearing before the Bench it was adjourned in order to await the decision of the Privy Council in the *Venkatagiri maintenance case*[1]. It was presumably expected that the judgment of the Privy Council in this case would clarify the law regarding the incidents of coparcenership. After the disposal of the *Venkatagiri maintenance case,* when the appeal was again taken up, it was posted for hearing before a Full Bench. It was heard by a Full Bench, Sir Lionel Leach, C.J., Krishnaswami Aiyangar and Somayya, JJ. The Full Bench held that the bequest of Veerakumara was inoperative and that the plaintiff's claim to partition was unsustainable. The conclusion proceeded wholly on the basis that the son Chellakrishna was a coparcener, notwithstanding his mental infirmity, and that the bequest by the father was consequently inoperative.

The learned Chief Justice in the first sentence of his judgment, says:

The question raised in this appeal is whether a congenital idiot has the status of a coparcener notwithstanding that he is excluded from the enjoyment of his share."

Lower down:

"If Chellakrishna was in law a coparcener with his father the latter admittedly has no right to bequeath the property held by him to his widow, because in such circumstances it would constitute the joint property of father and son."

The statement in the judgment regarding the admission by counsel must of course be accepted. But it seems incredible that the admission referred to could have been made by experienced counsel, with the decisions relating to impartible estates staring him in the face. The statement of the law by the learned Chief Justice, regarding the inalienability of coparcenary property, reads very much like the statement of the law by Sir James Colville, in *Bhugwandeen Doobey's case*[2]. But the coparcener in the Privy Council case was a widow, who, on account of the limitation imposed on her estate had no power of disposal which would extend beyond her lifetime. The position of male coparceners is obviously different. Ordinarily, no doubt, the operation of survivorship rules out the possibility of a bequest. But the incompatibility of a will with the rule of survivorship is by no means universal. This is perfectly clear from the law relating to impartible estates. It seems probable that the law relating to impartible estates was regarded as some-

1. *Raja Krishna Yachendra* v. *Raja Rajeswara Rao*, (1942) 1 M.L.J. 132; I.L.R. (1942) Mad. 419 (P.C.).
2. (1867) 11 Moo.I.A. 487.

thing altogether exceptional, and that the non-bequeathability of partible coparcenary property was regarded as unchallengeable. That, however, is the crux of the whole case; and it is here that the unhappy term *coparcener* was responsible for confusion of thought. Assuming that the son Chellakrishna was a coparcener entitled to take by survivorship, was the coparcenership of such a character as to deprive the father of testamentary power? It is strange that this question failed to receive any attention either from counsel or from the Judges.

The insistence on coparcenership has a significance, not merely from the point of view of the son, but from the point of view of the father also.

The coparcenership of the father cannot be less effective where the son is disqualified than in a case where the son is free from disqualification. Clearly, therefore, the father Veerakumara was entitled to exercise the right which belongs ordinarily to any coparcener, the right to sever jointness. If authority is necessary for this proposition it is to be found in *Venkateswara Pattar* v. *Mankayammal*[1]. The joint family in this case was like the joint family in *Amrithammal's case*, a family consisting of a father and a lunatic son, though the lunacy of the son in the earlier case was supervenient and not congenital. Varadachariar, J., referring to a partition effected by the father, said:

> " Once the conclusion is reached that a disqualified person may be a coparcener enough to take by survivorship, there is no reason why we should deny the possibility of such a severance of the joint status as would put an end to the right of succession by survivorship."

It must be noted that a partition in the circumstances of a case like the present can be effected by the unilateral act of the father. If the father filed a suit for partition against a son who is admittedly excluded from a share, he would be rightly laughed out of Court. He may of course set apart a portion of the property for the disqualified son if he so desires, but he is under no obligation to do so, as the son has admittedly no claim to divide the estate.

This aspect of the matter was considered recently in an Allahabad case, *Bhagwati Saran* v. *Parmeshwari.*[2] The joint family in this case consisted of two brothers, Har Shankar and Gauri Shankar. Gauri Shankar was a married man but had become insane. The family property had been divided and certain items had been allotted to the insane brother. Gauri Shankar had died leaving a widow and the dispute related to the widow's right of succession. As Har Shankar survived his insane brother, if the status of jointness continued, the widow would have no right of inheritance. The Judges held that the status of jointness had terminated and that the right of survivorship was inapplicable. They cited in support of this conclusion the decision of the Madras High Court in *Venkateswara Pattar* v. *Mankayammal*[1]. The insane brother had actually received a share of the properties, but the Judges conceded that he had no legal claim to division and that

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1. (1934) 69 M.L.J. 410 (420).
2. (1942) A.L.J. 197.

Har Shankar's right to sever jointness was not conditional on his sharing the family estate with his insane brother.

Allsop, J., says:

"I see no justification for the proposition that a member of a joint Hindu family who is ordinarily entitled to disrupt the family at will should be deprived of that right merely because the result would be that he could take the whole family property as a result of the disruption and leave to the other brother only a right to maintenance" (Page 239).

This argument is even more clearly applicable to a father. Whether he exercises his right as coparcener or acts by virtue of his higher status as father, he has unquestionably the right, by his mere unilateral declaration to appropriate the whole of the family property to his exclusive ownership subject of course to the disqualified son's right to maintenance. Suppose Veerakumara had made this declaration of severance and had then made the bequest in dispute, would the validity of the will be open to question?

There was a Madras case recently, *Narayana Rao* v. *Purushottama Rao*[1] in which a joint family consisted of father and son and the father desired to make some provision for another son who had been given away in adoption. The undivided son objected, whereupon the father sent a notice to the son severing jointness and then bequeathed his share in the family property to the adopted son. The bequest was upheld. The father had appropriated his share to his exclusive ownership and the restraint of survivorship had therefore disappeared. The bequest in this case was of a half share only, but that was because the father's coparcenary interest extended to a half share only. Where the son is disqualified the position is obviously different. The legal position may seem strange, but that is because the coparcenership of a disqualified son is itself a strange state of affairs. Where the undivided coparcenary interest of the father is liquidated by severance of jointness, what is it that falls to his exclusive ownership? Clearly the whole property, and on the principle of *Narayana Rao* v. *Purushottama Rao*[1], the whole of this becomes proper subject-matter of testamentary alienation.

The severance of jointness and the bequest are legally distinct transactions, but there is no reason why they should not be embodied in the same instrument. Such a case came before the Madras High Court in *Aiyavier* v. *Subramania Aiyar*[2].

The dispute in this case related to a settlement by the head of the family, who was the grandfather of the other coparceners. The settlement was found to be a composite transaction, being a combination of a partition and a gift, a partition effected unilaterally by the settlor in his character as grandfather, and a gift by the settlor of the property appropriated to his sole ownership by virtue of the partition. The Judges upheld the gift, holding that the partition and gift were each unimpeachable and that the combination of the two in one instrument was not legally open to challenge.

1. (1938) 1 M.L.J. 45: I.L.R. (1938) Mad. 315.
2. (1917) 32 M.L.J. 439.

Applying these considerations to Veerakumara's bequest, it is clear that it was entirely within the power of the testator to appropriate the whole of the property to his exclusive ownership and then to exercise over it an unimpeachable testamentary power. No decree of Court, no agreement with others, no external aid or sanction of any kind, was necessary.

If so much is conceded would it be in accordance with established legal principle to insist on the ritual of a formal severance? There is a helpful parallel in the law relating to alienation by a limited owner. She can surrender the whole of the property, whereupon the inheritance will vest in the reversioner and he will consequently acquire the power to alienate it to whomsoever he likes. Suppose she makes a gift of the whole property to a stranger with the consent of the reversioner. It is now settled law that such an alienation must be upheld[1], for the law looks at the substance of a transaction and not the form, and the gift of the whole estate with the reversioner may be treated, and where necessary should be treated, as a surrender by the limited owner followed by an alienation of the property by the reversioner. The principle here is obviously of general application. If it is within the unaided power of a person to achieve a particular object, the description which he gives to a transaction seeking to achieve that object is not legally a matter of great consequence. If Veerakumara could have put his bequest beyond dispute by inserting a recital of severance of jointness in his will, his omission to insert that recital cannot be a ground for nullifying that bequest. The Court is entitled to read that recital into the will, and in ordinary cases it would be its duty to do so.

So far as the decision in *Amrithammal's case* related to the validity of Veerakumara's bequest, and this was really the only practical issue in the case, the judgment of the Full Bench was vitiated by a confusion of thought regarding the connotation of the elusive term, *coparcener*, and, with great respect to the learned Judges, is indefensible. If Chellakrishna was a coparcener, his coparcenership was not of such a character as to be an impediment to his father's testamentary power. The argument of Sir Richard Couch in *Sartaj Kuari's case*[2], that the right to veto alienation must stand or fall with the right to partition, however open to criticism it may seem to be in relation to impartible estates, is really unanswerable in regard to partible coparcenary property of a joint family. Ordinarily in the case of partible property, coparcenership will be full and effective. The disqualified son, however, is the exception that proves the rule. The father's power of disposal over coparcenary property *vis a vis* the disqualified son, the power of disposal of the holder of an ancestral impartible estate *vis a vis* an expectant coparcener, the power of disposal of the father as against the son in relation to self-acquisition, all stand on the same legal footing. Coparcenership in these cases is not a

1. *Rangasami Goundan* v. *Nachiappa Goundan*, (1918) 36 M.L.J. 493: L.R. 46 I.A. 72: I.L.R. 42 Mad. 523, 536 (P.C.), *Yeshwanta* v. *Antu*, (1934) I.L.R. 58 Bom. 521.

2. (1888) L.R. 15 I.A. 51: I.L.R. 10 All. 272, 287 (P.C.).

restraint on alienation because it is imperfect and ineffective. It is worthy of note, in this connection, that Vijnaneswara recognises the right by birth of the son in all property belonging to the father whether self-acquired or ancestral, but he confines the *nishedhadhikara,* the son's right to veto alienation, to the part of the paternal estate which is ancestral in the hands of the father, for it is only here that *janmanaiva swatwa,* right by birth, has the character of a *sadrisam swamyam,* an equal and independent coparcenership.

So far it has been assumed that Chellakrishna had a right by birth in the properties of his father, and was a coparcener in the limited sense of being entitled to take by survivorship if his father predeceased him. The correctness of this assumption however is by no means patent. Chellakrishna's idiocy was congenital, as in fact idiocy must always be, and the recognition of right by birth in the case of a congenital idiot is a much more difficult question than one might suppose it to be, judging from the decision in *Amritham-mal's case.*

The dissociation of the right to take by survivorship from the right to claim partition, in the case of a person affected by disqualification, was first definitely enunciated in the judgment of the Madras High Court in *Muthuswami Gurukkal* v. *Meenammal*[1]. The disqualification in this case was due to supervenient insanity. Gangadhara and Subbayya were father and son, members of an undivided Mitakshara family. Subbayya died and then the father Gangadhara. Each left a widow. Subbayya's widow claimed the family properties. She contended that her father-in-law was a mere maintenance holder and that on the death of her husband who was the only effective owner, the family property descended to her as heir. This claim was rejected by the Judges. It was held that the insanity of Gangadhara might have been a bar to partition if any question of partition had arisen, but it could not prevent him from getting the benefit of survivorship when he became, as he did, the last surviving male member of the family. The decision in this case has been followed by the Patna High Court in *Dilraj Kuar* v. *Rikheswar*[2], by the Bombay High Court in *Vithaldas* v. *Vadilal*[3] and by the Allahabad High Court in *Mool Chand* v. *Chahta Devi*[4]. It seems unlikely in view of this weight of authority, that any argument will be allowed by Judges if the question again arises for decision, but it may be worth noting that the logic of the matter is not wholly on one side. Before the judgment in *Muthuswami Gurukkal's case,* in *Tirbeni* v. *Muhammad*[5], the Allahabad High Court took the view that the right to partition is unalterably fixed by the coparcenership accruing at birth, and that the right could not be affected by supervenient insanity. This of course was a misapplication of the rule that a vested estate cannot be divested, and it is unquestionably opposed to the law regarding disqualification for partition laid down in the Smritis. The Judges in *Muthuswami Gurukkal's case* conceded that the right to partition must depend on the conditions existing at the time of partition,

1. (1918) 38 M.L.J. 291: I.L.R. 43 Mad. 464.
2. (1934) I.L.R. 13 Pat. 712.
3. (1935) 38 Bom.L.R. 257.
4. I.L.R. (1937) All. 825 (F.B.).
5. (1905) I.L.R. 28 All. 247.

and though existing at birth might be taken away by supervenient insanity. This may well be the Achilles' heel of the reasoning which the Judges adopted. If the effectiveness of vested coparcenership may be weakened by supervenient disability for purposes of partition, why should not a similar weakening be recognised for other purposes? What is the compelling justification for according to survivorship a greater security than partition? If disability existing at partition bars the claim to a share, why should not survivorship be defeated by the existence of a disability existing at the time when the right would otherwise become operative? It is not suggested that the judgment in *Muthuswami Gurukkal's case* should be reconsidered in the light of this criticism. But it may be useful to note that there is something to be said for the view which failed to find favour with the Judges who decided that case.

Whatever the position may be in regard to supervenient disqualification, would congenital disability be governed by the same considerations? Until the judgment in *Amrithammal's case*, the right to take by survivorship was never recognised in cases where the disqualification was congenital. What is more, in *Pudiava Nadar* v. *Pavanasa Nadar*[1], a Full Bench of the Madras High Court definitely negatived the right of survivorship in a case of congenital blindness. The Judges in *Amrithammal's case* have dissented from this Full Bench judgment on the ground that it is inconsistent with more weighty pronouncements. They have held that there is a coparcenership in persons affected by disqualification, and a right of survivorship founded on that coparcenership, whether the disqualification is congenital or supervenient, provided there is fitness to marry. The congenitally idiot son Chellakrishna was qualified to take by survivorship according to this view as he married and begot two sons. In taking this view of the law the Judges were influenced mainly by two authorities. One is the judgment of the Madras High Court in *Krishna* v. *Sami*[2]. The other is the statement of the law regarding disqualified members of a joint family in the Saraswati Vilasa.

The decision in *Krishna* v. *Sami*[2] was given about sixty years ago, in 1885, in the spacious days when the corpus of Hindu Law was still being built up, and considerable discussion was permissible and necessary on many matters which would now be regarded as mere commonplace. Reading that judgment in retrospect one may well feel a sense of wonder that so much argument should have been necessary on so simple an issue. The dispute related to a claim to partition. The property had originally been held in coparcenary by two brothers, Sami Reddi and Venkatasami Reddi. Sami Reddi died leaving a son who was congenitally deaf and dumb. The effective control of the family property passed then into the hands of Venkatasami Reddi's branch of the family. The plaintiffs in the case were two sons of Sami Reddi's disqualified son. Whether their father had married before the death of their grandfather Sami Reddi is not clear. Admittedly however the birth of the plaintiffs took place only after the death of Sami Reddi. In these circumstances their claim to partition was opposed on the

1. (1922) 43 M.L.J. 596: I.L.R. 45 Mad. 949 (F.B.).
2. (1885) I.L.R. 9 Mad. 64 (F.B.).

ground that the family property had become vested in Venkatasami Reddi's branch of the family on the death of Sami Reddi, and that this vested right could not be divested by the subsequent birth of sons to Sami Reddi's disqualified son. The Judges rejected this contention and upheld the claim of the plaintiffs to a half share of the property.

But for the fact that the Bombay High Court had taken in *Bapuji Lakshman* v. *Pandurang*[1], on substantially similar facts, a view different from that which the Madras Judges adopted, one might well say that the question raised in *Krishna* v. *Sami*[2] could have been answered in one way only. The superficial plausibility of the contention, which Sir Charles Turner and his colleagues rejected, was based practically wholly on the reasoning of *Kalidas* v. *Krishna*[3]. There is a fundamental distinction, however, between the law of the Dayabhaga, with which *Kalidas* v. *Krishna*[3] was concerned, and the law of the Mitakshara with which the Madras High Court had to deal. *Kalidas* v. *Krishna*[3] had to deal with a claim to divest a vested inheritance. *Krishna* v. *Sami*[2], on the other hand, had to deal with the incidents of corporate ownership in an undivided Mitakshara family. The suit property belonged to a joint family consisting of two branches, descended from two brothers. The composition of this joint family might fluctuate, either by augmentation consequent on the operation of right by birth, or by diminution consequent on the operation of survivorship. But the joint family itself was a permanent corporate entity distinct from the mere arithmetical summation of the individuals composing it. Coparceners might come and go, but the family itself would remain unchanged subject to the possibility of being destroyed by partition. Some members of the family might be coparceners, others might be entitled to maintenance only. But the property belonged to the joint family and not to the individual members, and all persons coming into it, either by marriage as in the case of the wives, or by birth as in the case of the sons, would get the rights appropriate to their status as members of the joint family. The plaintiffs in the case were clearly entitled to the benefit of this principle. They were personally free from disqualification, and when they were born into the family they acquired the status of coparcenership and the rights attaching to that status even though they were the sons of a disqualified father. The law is explicitly laid down by the law-givers and the Mitakshara, that the status of an aurasa son, himself free from defect, is unaffected by the disqualification which may affect his father.

The apparent reasonableness of the contention, which the Judges took so much trouble to refute, arose from the fallacious supposition that the death of Sami Reddi, leaving no representative in his branch of the family except a disqualified son, had the effect of transferring the family property from the major family, consisting of himself and his brother, to the minor family consisting of his brother's descendants. This, of course, was a fundamental misapprehension regarding the structure of a Mitakshara

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1. (1882) I.L.R. 6 Bom. 616.
2. (1885) I.L.R. 9 Mad. 64 (F.B.).
3. (1869) 2 Beng. L.R. 103 (F.B.).

joint family and the incidents attaching to corporate ownership among its members. The branch of the family descended from Sami Reddi may have withered, but it was not dead. The assumption that ownership had been deflected to Venkataswami's branch of the family, failed to distinguish between the coparcenary and the joint family. This is to-day a common place of Mitakshara law, but of course the platitude of today may have been a novelty sixty years ago.

It was sufficient for the purpose of the judgment in *Krishna* v. *Sami* to point out that there is no such thing as inheritance, or vesting of property in individuals, inside a Mitakshara joint family. The Judges did point this out and the judgment might well have stopped there. Unfortunately, after a survey of the relevant textual authorities, the learned Judges summed up the legal position regarding the status of a disqualified member of a joint family in some attractive but misleading figures of speech:

"There are classes of disqualified persons who cannot be relieved of their disqualification and cannot transmit heritable blood; there are classes who, though they may be unable to be relieved of their disqualification, are capable of transmitting heritable blood. Their right to share in the family wealth is latent or may come into existence at a future time as it does in the case of the afterborn son. When it comes into existence, either in the person of the formerly disqualified heir or of his sons, it is to be recognised. If capable of transmitting heritable blood, they are share-takers though not at the time share-enjoyers. If the son of a disqualified person is born in his grandfather's lifetime and his father dies, he is at once entitled to be recognised as a member of the coparcenary. The only ground for depriving him of that right, if his father dies after the grandfather's death, is insistence on the rule against divesting an estate once vested[1]."

This statement of the law is largely based on the Saraswati Vilasa which will be considered presently. But one thing must be cleared up immediately. Did the Judges mean that the father of the plaintiffs was excluded by his disability from the status of coparcenership, only for purposes of partition, and for the purposes of survivorship was to be regarded as a coparcener? That is how the Judges in *Amrithammal's case* have used the authority of *Krishna* v. *Sami*. Is that correct? If the disqualified son of Sami Reddi was entitled to the benefit of survivorship, notwithstanding his disability, that was a straight answer to the argument based on divesting a vested estate. Why then did the Judges go on to argue that the case before them was an exception to the rule that a vested estate cannot be divested? Immediately after the passage quoted above, Sir Charles Turner says:

"That the rule prohibiting the divesting an estate once vested in a full owner cannot be laid down without exception, in respect of property governed by the law of the Mitakshara, appears to be established by admitted rules and by judicial decision."

Then he goes on to give various illustrations, and winds up by a pointed reference to the *Berhampore case*,[2] where the estate vested in Raghunatha was held by the Privy Council to be divested by the adoption made to the previous holder of the zemindary,

1. (1885) I.L.R. 9 Mad. 64, 77, 78 (F.B.).

2. *Raghunatha Deo* v. *Brozo Kishoro*, (1876) L.R. 3 I.A. 154: I.L.R. 1 Mad. 69 (P.C.).

Adikonda Deo, by his widow. The learned Judges then close the judgment with the following words:

"The existence of a valid power creates a potentiality of inheritance which may be likened to that of the son in the womb. The estate is taken conditionally. It is difficult to distinguish these cases from that of the disqualified sharetaker, who may afterwards become qualified to demand possession or beget a qualified son. In our judgment it must be held that the estate vests subject to its being divested on the recovery of the disqualified or the birth of a qualified heir[1]."

If the judgment in *Krishna* v. *Sami* had accepted the dissociation of survivorship from partition, in the manner of *Amrithammal's case*, what significance is to be attached to the argument based on the *Berhampore case*, and more especially to the categorical statement that the vesting of the estate, in the case actually in dispute, was subject to divestment on the birth of the plaintiffs. There would be no divestment whatever if the persons taking by survivorship, on the death of Sami Reddi, included Sami Reddi's disqualified son. It is because the Judges did not go as far as that, but accepted the view that the family property was solely vested in the defendant's branch, prior to the birth of the plaintiffs, that the argument about vesting and divesting had to be considered. This is absolutely vital, for the Judges in *Amrithammal's case* apparently understood the references to latent sharership and transmission of right, occurring in Sir Charles Turner's judgment, as authority for the view that the disqualified member, subject to a disability limited to partition, has, in his own person, solely by virtue of fitness to marry and independently of whether sons have been born or not, the status of a coparcener and the right to take by survivorship which is annexed to that status. Whether this view of the law is supported by the Saraswathi Vilasa, will presently be considered; but the authority of *Krishna* v. *Sami*, so far as it is material, appears to be against this view rather than in favour of it. It must of course be admitted that seeds of confusion were sown in the pictorial phraseology of Sir Charles Turner, and the sprouting of those seeds is to be seen now in *Amrithammal's case*.

The Saraswathi Vilasa, which has been brought into special prominence in connexion with the status of persons affected by disqualification, is numbered among the authoritative subsidiary commentaries of the Mitakshara Law. It does not figure in Colebrooke's first catalogue of Hindu Law Commentaries, but was introduced to fame by Mr. Ellis of the Madras Civil Service, and was eventually included among the treatises of the southern branch of the Mitakshara. It must be noted, however, that the propositions enunciated in these subsidiary commentaries have not all been accepted. It would be impossible to do so, in fact, for they differ among themselves in several respects. So far as the Saraswathi Vilasa is concerned, considerable difficulty was felt by the Judges in the *Jaggumpet case*[2] in applying the somewhat abstruse doctrine propounded in this commentary, on the authority of the great Lakshmidhara, regarding the inclusion of the heritage of the daughter's son in the category of *apratibandha daya*. The Judges

1. (1885) I L.R. 9 Mad. 64, 79 (F.B.).

2. *Chelikani Venkataramanayamma* v. *Appa Rao*, (1897) 7 M.L.J. 143: I.L.R. 20 Mad. 207, 218, 219.

held that it was impossible to reconcile this doctrine with the theory of *apratibandha daya* as formulated by Vijnaneswara. Caution is therefore needed, clearly, in the application of rules laid down in the Saraswathi Vilasa where they appear to depart from the law laid down in the Mitakshara. What is the position of the Saraswathi Vilasa in the context of the present discussion?

The relevant passage of the commentary is an exposition of the text of Manu regarding those who are disqualified for partition. It runs as follows:

मनुरपि दायानर्हानाह

अनंशौ क्लीबपतितौ जात्यन्धबधिरौ तथा ।

उन्मत्तजडमूकाश्च ये च केचिन्निरिन्द्रियाः ॥

अस्यार्थः—अनंशौ क्लीबपतिताविति द्वित्वोक्त्या दायार्हभ्रातृभिः रिक्थग्राहैर्वा योषिद्ग्राहैर्वा पोष्यौ ; जात्यन्धबधिराविति द्वित्वोक्त्या तयोरंशोऽस्त्येव ; किंत्वंशयुक्तावपि पोष्यौ विवाहसंस्कारसद्भावात् । तथा शब्दप्रयोगेण पङ्ग्वादयः विवाहसंस्कारार्हाश्चेदंशहराः पोष्याश्चेति रहस्यम् । उन्मत्त जडमूकाश्चेति समुच्चयोक्त्या तेऽपि भर्तव्या एव नांशहराः । विवाहार्हा न चेदिति शेषः ॥[2]

Manu also specifies those who are disqualified for daya.

The (*kliba*) hermaphrodite and the (*patita*) degraded are disqualified for sharing; so also those born blind or deaf; also the lunatic, the idiot and the dumb and also those devoid of an organ of sense.

The meaning of this text is as follows; from the dual proposition that the *kliba* and the *patita*, are excluded from share, it is to be understood that these are to be maintained by the brothers entitled to share, or in cases of inheritance, those who take the wealth or those who take the women. From the dual proposition regarding the congenitally blind and deaf, it is to be understood that a share certainly belongs to them; but though they are entitled to a share they are to be maintained on account of the possibility of marriage. From the use of the word *tatha* (in that manner) the hidden meaning is that the lame and others, if fit for the sacrament of marriage are sharetakers and entitled to maintenance. From the plural proposition regarding the lunatic, the idiot and the dumb, it is meant that they also are entitled to maintenance but do not take shares. In this statement denying share, the proviso, if they are not fit to marry, is to be understood.

It will be noticed that there is an affirmation of the status of sharership here, seemingly, in the case of various categories of disqualification, provided the person afflicted is fit to marry. The proposition is first enunciated with reference to congenital blindness and deafness. In the next placitum it is reiterated with reference to lameness and other categories of disability; lower down, the same thing is said with reference to the lunatic, the idiot and the dumb. Explicit reference is made to congenital disability only in the case of blindness and deafness, but the failure to refer expressly to congenital disability in other cases is probably not material, for in at least one of these other cases, the *jada* or idiot, the affliction must necessarily be congenital. We get, therefore, an apparently novel doctrine, propounding the paradoxical view

1. *Saraswathi Vilasa*, Mysore Edition p. 364; Foulkes's Edition, placita 148, 149.

that those who are declared *anamsa,* devoid of share, are nevertheless, *amsahara,* sharetakers, provided they are fit to marry. What is the explanation of this?

Does the Saraswathi Vilasa affirm full coparcenership, carrying with it the right to demand partition, in the case of every male member of the family who is fit to marry? In other words has this commentator shifted the basis of disqualification from physical or mental affliction to the capacity to marry and beget children? If the Saraswathi Vilasa goes as far as this, then the law of the Saraswathi Vilasa is certainly not the Hindu Law of the British Courts, for it has been conceded consistently in decided cases including *Amrithammal's case,* that those who are declared *anamsa* by the lawgivers are excluded from the right to partition irrespective of whether they are or not fit to marry and beget children. There is really no reason, however, for supposing that the Saraswathi Vilasa differs from the other law books in regard to this matter.

In a placitum lower down than the passage quoted above, commenting on the texts of Yajnavalkya, Vishnu and Devala, which say that the qualified son is entitled to a share, notwithstanding his being the son of a disqualified father, the Saraswathi Vilasa says:

निरम्शकपुत्राणामम्शग्रहणविरोधिव्याध्याद्यभावे पैतामहधनप्राप्तिः[1] ।

The sons of the *niramsakas* in the absence of disease, etc., excluding them from a share, are entitled to their rights in the grandfather's (ancestral) property.

If the existence of a qualified son is sufficient to annul the disqualification of the father, the phrase, *niramsakaputra,* son of the shareless man, must obviously be a contradiction in terms. Clearly, therefore, the *niramsaka* father is still a *niramsaka,* according to the Saraswathi Vilasa, even though he has a son who is *amsahara,* qualified to share in the family property. This is important, for it throws valuable light on the paradox that an *anamsa* is an *amsahara* if he is *vivaharha,* fit to marry, which occurs in the passage on which great stress has been laid in *Amrithammal's case.*

The passage in dispute is a comment on the text of Manu[2] regarding exclusion from inheritance and partition. The text says that those who are congenitally blind and deaf, *jatyandha badhirau,* are excluded from partition. The comment of the Saraswathi Vilasa on this is *prima facie* an amazing contradiction of what Manu says: तयोरंशोऽस्त्येव, to them a share certainly belongs, says the commentator. Somayya, J., lays great stress on this, but the learned Judge, who is a keen Sanskritist, has unfortunately failed to note the significance of the words that immediately follow.

But even though entitled to a share, they are to be maintained, owing to the possibility of marriage.

1. *Saraswathi Vilasa,* Mysore Edition, p. 365; Foulkes's Edition, placitum 158.

2. Manu Smriti IX, 201.

This is an extraordinary way of affirming the afflicted man's coparcenership. Is not every coparcener entitled to maintenance as a matter of course? Why then does the commentator say किन्तु (*but*), and why अपि (*even though*), entitled to a share? These are words that are commonly used to unite propositions which do not quite harmonise with each other. But maintenance is one of the ordinary incidents of sharership. What is the explanation of this mysterious enunciation of the law? The answer is, clearly, that the sharership affirmed by the commentator is figurative, not actual, a status which is vicarious and potential, not personal and present. The stress on the proposition regarding maintenance is negative, not positive. The idea is, not, he is entitled to maintenance, but, he is entitled to maintenance only, no more. In order to understand the position correctly it is necessary to look at the text of Manu which is the basis of the commentary, in the context in which the lawgiver has placed it. Following this text immediately there are two other texts, one affirming the right to maintenance, the other affirming the rights of the disqualified man's issue.

सर्वेषामपि तु न्याय्यं दातुं शक्त्या मनीषिणा ।
ग्रासाच्छादनमत्यन्तं पतितो ह्यददद्भवेत् ॥
यद्यर्थिता तु दारैः स्यात् क्लीबादीनां कथंचन ।
तेषामुत्पन्नतन्तूनांमपत्यं दायमर्हति ॥[1]

For all of them it is proper that food and raiment should be given according to capacity as long as they live. The taker of the property, who does not give them food and raiment, shall be *patita*. If somehow or other the *kliba* and others should desire to marry, the children of those who get progeny shall be qualified to take *daya*.

The Saraswathi Vilasa does not quote these texts. It seems probable, though the suggestion rests on mere speculation, that the commentator was reluctant to quote a text of Manu which in terms speaks of a *kliba* perpetuating lineage by marriage. Lower down, in commenting on Yajnavalkya's text regarding the rights of the disqualified man's son, the commentator brushes aside the reference to the kshetraja son, who is put by Yajnavalkya on the same footing as the aurasa son.

तद्द्वापरादियुगविषयमिति मन्तव्यम् । कलौ क्षेत्रजपुत्रनिषेधात् ।[2]

That should be understood to refer to the Dwapara and other Yugas, for in the Kali age the kshetraja son is forbidden.

It is not unnatural, in view of this attitude, that the author was reluctant to quote a text of Manu which speaks of the *kliba* marrying and producing vicariously sons who will be free from the disqualification attaching to the father. But in so far as the principle was applicable to aurasa sons the law had to be stated, and the curious method was adopted by the commentator of reading that proposition into the quoted text which affirms the father's disability, instead of quoting the succeeding texts of Manu himself.

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1. Manu, IX, 202-203.

2. *Saraswathi Vilasa*, Mysore Edition, page 365; Foulkes's Edition, placitum 157.

The rule regarding food and raiment, and the rule regarding the status of the issue, are both enunciated in the Saraswathi Vilasa as if they are qualifications which have to be read into Manu's text by external interpretation, and not propositions explicitly enunciated by the lawgiver himself. If this is kept in mind the meaning of the mysterious passage of the Saraswathi Vilasa presents no difficulty. The text of Manu is analysed, the categories of disqualification represented by each *samasa* being taken separately. First come the *kliba* and *patita*, in whose case the right is to maintenance only. Then come the congenitally blind and deaf, in whose case there is a seemingly emphatic affirmation of sharership, followed by the statement, *though* there is a right to share they are entitled to maintenance. The concession of sharership is stated to depend upon the possibility of marriage. The relegating of the ablative *vivahasamskara sadbhavat,* to the end of the sentence is infelicitous, for it makes the sentence read as if the right to maintenance is founded on the capacity to marry. Clearly, however, it was meant to apply to the share, not to the maintenance[1]. But in what sense is capacity to marry significant in this context? Does the Saraswathi Vilasa affirm a real right of coparcenership? Obviously not, for then the किन्तु (*but*), and अपि (*although*), would have no meaning whatever. The commentator is merely referring to the figurative and vicarious coparcenership represented by the status of the sons that may be born to the disqualified man. The किन्तु is a caveat, a hurried attempt to correct a possible misapprehension. It is as if the commentator has said, the disqualified man will take a share in the person of his son, and then had gone on to say, let there be no mistake, personally in his own right the unfortunate man is entitled to no more than maintenance.

Seshagiri Aiyar, J., in *Muthusami Gurukkals's case*[2], has thrown out a suggestion that the share of the disqualified man was to be managed for him according to the Saraswathi Vilasa. This presupposes a right to share in the event of a partition. But it is quite clear that the Saraswathi Vilasa did not contemplate the setting apart of a share for the disqualified member of the family. The word पोष्यौ (*are to be maintained*), refers to the *grasachhadana* of the Manusmriti, the food and raiment to which alone the *anamsa* was entitled. It does not refer to the protection and management of any share, for no right to share is recognised either by the lawgiver or the commentators.

On the view suggested above there is no justification for reading the Saraswathi Vilasa as if it laid down any novel rule unknown to the other law books. The commentator is reading into one text of Manu the propositions that Manu himself has distributed between three texts. There is really no *rahasya* or secret doctrine, for the proposition that an *anamsa* is *amsahara,* if fit to

1. I had intended to examine all the available manuscripts of the Saraswathi Vilasa to see if there was any doubt regarding the correct reading of the disputed passage. But I could not find the necessary time and leisure. Foulkes says that he examined a sufficient number of manuscripts to establish a reliable text. His claim is probably well founded.—*K.V.V.*

2. (1918) 38 M.L.J. 291: I.L.R. 43 Mad. 464, 473.

marry, is merely a combination of the actual present with the potential future. The author of the Saraswathi Vilasa was a king who loved to pose as a lawyer, and there is nothing surprising in his desire to present the old law in a new guise, clothing a platitude with the appearance of a paradox.

Attention must be drawn, before proceeding further, to the difference made by the Saraswathi Vilasa between the congenitally blind and deaf, on the one hand, and the lunatic, idiot and the dumb, on the other, regarding fitness to marry. In the former case, the commentator took it for granted that there is capacity to marry. In the case of the lunatic and others, on the other hand, the position is stated conditionally, *if* there is fitness to marry. This clearly implies that the capacity for marriage is not as indisputable in the second group of cases as in the first. This is made clear later on, in dealing with the text of Apastamba.

जीवन् पुत्रेभ्यो दायं विभजेत् समं क्लीबंमुन्मत्तं पतितं च परिहाप्य.

The father shall during his lifetime divide the wealth among his sons equally, excluding the *kliba*, the *unmatta* and the *patita*.

The commentator states that the exclusions here refer to sons who are unfitted for sharership and goes on to add

च शब्दो विवाहानर्हाणामुपलक्षकः[1] ।

The word च, (*and*) must be understood to comprise others who are not fit for marriage.

An *unmatta* or lunatic, therefore, may or may not be fit for marriage. It would apparently be, as the Privy Council said in *Mouji Lal* v. *Chandrabati*[2] a question of degree. The point is of special importance in view of the opinion expressed by the learned Chief Justice in *Amrithammal's case*, that a congenital idiot is competent to marry under Hindu Law. A marriage had taken place in the litigation before the Judges, and the case was clearly governed by the very strong presumption of validity that applies to a marriage which is shown to have taken place. Indeed, the Judges might very well have worked backwards from this presumption and held that Chellakrishna could not have been a congenital idiot. The question is not so wholly one of fact that the Judges in Second Appeal could not have done this. But even if that were not possible, there was no need to lay down, positively and universally, that idiocy is no bar to marriage under Hindu Law. For part of the confusion prevailing on this matter, a learned Hindu Judge, Muthuswami Aiyar, J., must bear the responsibility. It was he in *Venkatacharyulu* v. *Rangacharyulu*[3] that propounded the dictum, that insanity is no bar to marriage under Hindu Law. In relation to the bride, whom Hindu Law regards as the object of a gift, the proposition is unexceptionable. In relation to the bridegroom, unless the insanity referred to is merely defective or disordered intelligence, the proposition is utterly opposed to the basic ideas of the Dharmasastra.

1. *Saraswati Vilasa*, Mysore Edition, p. 365; Foulkes's Edition, placitum 155.
2. (1911) 21 M.L.J. 933: L.R. 38 I.A. 122: I.L.R. 38 Cal. 700, 706 (P.C.).
3. (1890) 1 M.L.J. 85: I.L.R. 14 Mad. 316, 318.

The bridegroom is the recipient of a gift, the bride being the object of the donation, and he has further to take an intelligent part in religious ceremonies. The law on this matter appears to be, judging from decided cases, a pitfall for English Judges. They are familiar with the proposition that marriage under Hindu Law is not a contract, which is a half truth, for though it may not be a contract in the sense of an English marriage, a contract between husband and wife, it is nonetheless a bilateral transaction to which the bridegroom is a party, being a gift of the bride to him by the girl's father or guardian. Many Judges, unfortunately, have taken the proposition that marriage is a sacrament and not a contract under Hindu Law, to imply that nothing in the world is too irrational for a Hindu marriage. The notion that marriage is a sacrament under Hindu Law has unhappily become in the hands of well meaning but ill-informed English Judges, the subject of a great deal of caricatural distortion. It is remarkable that there should be two judgments delivered this year[1] supporting the generalization that insanity of a male presents no impediment to lawful marriage. The actual decisions were probably right, but the general enunciation of the law, divorced from the concrete setting of facts, may well produce strange results in the subordinate Courts.

Going back to *Amrithammal's case* and reading it in the light of what has been said about *Krishna* v. *Sami* and the Saraswathi Vilasa, what were the relative rights of Veerakumara and his idiot son Chellakrishna? When Veerakumara died the sons of Chellakrishna were not in existence. Admittedly they were born later. The bequest of Veerakumara must be judged by the state of affairs at the time of his death. If it was valid then, it could not be invalidated by subsequent events. That is clear from the decision of the Privy Council in *Krishnamurti* v. *Krishnamurti*[2]. The question therefore comes to this, was Chellakrishna in his own right a coparcener with his father Veerakumara? The Judges answered this question in the affirmative relying on *Krishna* v. *Sami* and the Saraswathi Vilasa. The learned Chief Justice says:

"The fact that a son is born with an affliction which disqualifies him from enjoying his share does not rob him of his birthright. The affliction merely prevents his enjoyment of the right while the affliction lasts. The fact that the ancient texts recognise that his son, should one be born to him, has the right to share in the family estate is itself an indication that he is a member of the coparcenary" (page 299).

This, of course, is merely the direct application of the retroactive reasoning suggested in *Krishna* v. *Sami*, which works backwards from the qualified son to the disqualified father and seeks a justification for the father's coparcenership in the reflected lustre cast on him by the qualified son. The argument assumes that the coparcenership of the son which is admitted must be a status derived from the father. Is that assumption correct?

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1. *Amrithammal* v. *Vallimayil Ammal*, (1942) 2 M.L.J. 292; *Bhagwati Saran* v. *Parmeshwari*, (1942) A.L.J. 197.

2. (1927) 53 M.L.J. 57: L.R. 54 I.A. 248: I.L.R. 50 Mad. 508, 525 (P.C.).

The Mitakshara introduces the text of Yajnavalkya which says that the qualified son is sharer even though he is the son of a disqualified father, with the following words:

क्लीबादीनामनंशित्वात्तत्पुत्राणामप्यनंशित्वे प्राप्ते इदमाह
औरसाः क्षेत्रजास्त्वेषां निर्दोषा भागहारिणः[1] ।

"From the exclusion from shares of the *kliba* and others, the exclusion of their sons also would follow, therefore the lawgiver states:

Their sons, aurasa and kshetraja, if personally free from defect, will take shares."

This shows that it is a mistake to speak of the disqualified father being the medium through which the qualified son derives his coparcenership. The Smriti Chandrika explicitly says[2] that the coparcenership conceded to the son is an *apavada*, the annulment by express textual authority of the disqualification which would otherwise have affected the son also. The idea of transmission, originating in *Krishna* v. *Sami*, is in fact a figure of speech which proves either too much or too little. If the recognition of a right of the son implies the recognition of a similar right in the father, how does it happen that the son has a right to partition, whereas the father has not? On the other hand, if it is admitted that the status of the father may be inferior to that of the son, what is the justification for supposing that the status of coparcenership must be conceded to the father because the son has admittedly the rights of a coparcener? That will be not merely inversion of logic but falsification of the law also. There are several cases known to the law where the child has a status which is denied to the parent. The sister's son is entitled to inherit under the Dayabhaga law, but the sister herself is excluded. What happens here to the idea of transmitting heritable blood? The principle applied to reversioners in *Bahadur Singh* v. *Mohar Singh*[3] and other cases, that the relationship of the son must necessarily be traced through his father, but his reversionership itself is in his own right and not through the father, is equally applicable to the coparcenership conceded to the qualified son of a disqualified father. The relationship to the grandfather and other members of the joint family must no doubt be traced through the father. But the status of coparcenership itself is inherent and not derivative. The theory of *Krishna* v. *Sami* that there is a coparcenership latent in the father which becomes manifest in the son is a metaphorical varnish which hides the fatal weakness of the legal position. The Judges were dealing with a case where qualified sons had been born. The father himself was of no consequence. Their description of the father as one whose coparcenership was latent, was an euphemism. This is clear from the analogy with which the judgment of Sir Charles Turner closes, between the *Berhampore case* and the actual facts of *Krishna* v. *Sami*. The potentiality of the future son's co-parcenership was the crucial idea in both cases. But the potential coparcenership of a future son is obviously not an

1. Mitakshara, Setlur's Edition, pp. 838, 839.
2. *Smriti Chandrika*, Mysore Edition, Vyavahara Kanda, p. 633.
3. (1901) 12 M.L.J, 56: L.R. 29 I.A. 1: I.L.R. 24 All. 94 (P.C.).

adequate basis for a present claim to survivorship. The disqualified father is *dayanarha*, incompetent to acquire *swamya* by virtue of his relationship, and excluded by his incapacity for *daya* from the right to take by survivorship. If the disqualified man can introduce a coparcener into the family by begetting a son, it can be said with equal force that a widow can introduce a new coparcener into the family by the exercise of her power of adoption. There is as much or as little justification for a personal claim to survivorship in the one case as in the other.

Would it be improper to suggest that the decision in *Amrithammal's case*[1] should be reconsidered? In so far as it related to the question of bequest its authority as a binding precedent is doubtful, because it proceeded on an admission which should never have been made. So far as it related to the question of survivorship in the case of a person affected by congenital disqualification, apart from the merits of the controversy, it is admittedly in conflict with the previous Full Bench decision in *Pudiava Nadan's case*[2]. The Judges dissented from this Full Bench decision on the ground that it was inconsistent with the more weighty pronouncement in *Krishna* v. *Sami*[3]. But *Krishna* v. *Sami* does not deal directly with a claim to survivorship by a person affected by congenital disability. If the dicta of Sir Charles Turner seemed to point in that direction, *Amrithammal's case* might have been referred to a Full Bench of five Judges. The present position is clearly unsatisfactory. Is it inconceivable that a future Full Bench may accord to the judgment in *Amrithammal's case* the treatment that the Judges in this case accorded to *Pudiava Nadan* v. *Pavanasa Nadan*? Argument must doubtless stop somewhere, but the enduring stability of the law will be promoted by the timely correction of a mistake much better than by the technical insistence on the perpetuation of error. Is not the finality attaching to a Full Bench judgment itself a reason for placing it on a foundation of unchallengeable authority?

SUMMARY OF ENGLISH CASES.

DUNCAN *v.* CAMMEL LAIRD & CO., LTD., (1942) 1 All.E. R. 587 (H.L.).

Practice—Discovery—Objection by Crown to production of documents in civil action on the ground that it would be contrary to public interest to produce them—Grounds of.

Where the Crown claims privilege against production of documents the principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interests require that they should be withheld. This test may be found to be satisfied either (*a*) by having regard to the contents of the particular document or (*b*) by the fact that the document belongs to a class which, on grounds of public interest, must as a class be withheld from production.

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1. (1942) 2 M.L.J. 292 (F.B.).
2. (1922) 43 M.L.J. 596: I.L.R. 45 M. 949 (F.B.).
3. (1885) I.L.R. 9 Mad. 64 (F.B.).

As to the proper form of taking the objection that the production of the document will be contrary to public interest, the essential matter is that the decision to object should be taken by the minister who is the political head of the department, and that he should have seen and considered the contents of the document and himself have formed the view that on grounds of public interest they ought not to be produced, either because of their actual contents or because of the class of documents—*e.g.*, departmental minutes—to which they belong. Where it is not convenient or practicable for the political minister to act (*e.g.*, he may be out of reach, or ill, or the department may be one where the effective head is a permanent official) it would be reasonable for the objection to be taken by the permanent head. If the question arises before trial the objection would ordinarily be taken by affidavit. If it arises on *subpoena* at the hearing, the minister's objection can be conveyed to the Court, at any rate in the first instance, by an official of the department who produces a certificate which the minister has signed, stating what is necessary. If the Court is not satisfied by this method, it can request the minister's personal attendance.

When such objection has been validly taken the judge has to treat it as conclusive and decide accordingly.

The mere fact that the documents are "state documents" or "official" or are marked "confidential" would not afford to the minister adequate justification for objecting to production. It would not be a good ground that, if they were produced, the consequences might involve the department or the government in parliamentary discussion or in public criticism, or might necessitate the attendance as witness or otherwise of officials who have public duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the minister or the department does not want to have the document produced. The minister ought not to take the responsibility of withholding production except in cases where the public interests would otherwise be damnified—*e.g.*, where it would injure national defence, or good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service.

(1941) 1 All.E.R. 437, affirmed.

Middlesex County Council *v.* Kiverstein, (1942) 1 All.E.R. 596 (C.A.).

Public Health Act, 1936, S. 184 (1)—Right of hospital authorities to recover expenses of maintenance of a patient from his estate on his death.

It is provided by the Public Health Act, 1936, S. 184 (1) . . "that a county council . . shall, recover from a patient, or from any person legally liable to maintain him, or from the patient's estate, if he has died, any expenses incurred . . . . in providing for his maintenance . . . . , not being expenses recoverable from any other source . . . . . . ".

Where on the death of a woman patient the hospital authorities claimed the expenses from the patient's estate and it was contended

that the claim was excluded by the words "not being expenses recoverable from any other source" since the expenses could be recovered in contract against her husband,

Held, the words of limitation refer to the right to recover the expenses under the Road Traffic Act in which hospital expenses can be recovered against a defendant to a claim for an accident upon the road. Accordingly the claim against the estate cannot be resisted.

GUARDIAN TRUST AND EXECUTORS CO. OF NEW ZEALAND LTD. *v.* PUBLIC TRUSTEE OF NEW ZEALAND, (1942) 1 All.E.R. 598 (P.C.).

Will—Executors—Obtaining order of Court and paying certain legacies after notice of dispute as to validity of will—Liability of executors.

After obtaining an order of Court, the executors under a will, with notice of a dispute as to the validity of the will—published notices requiring "all creditors and other persons" having claims against the estate of the deceased to send in such claims to the executors "together with written particulars thereof" on or before January, 31, 1936. The notices stated that, after such date the executors proposed to distribute the assets among the parties entitled thereto having regard to the claims of which they should have then received notice. Solicitors acting for some of the next of kin wrote on December 18, 1935, to the executors of steps being under consideration to obtain a revocation of the probate on the ground of lack of testamentary capacity on the part of the testatrix. A formal acknowledgment was sent to the solicitors but otherwise no notice was taken of it by the executors who on various dates between February 14 and 20, 1936 made payments of various legacies. On February 20, the solicitors again wrote that they had received instructions to take proceedings for revocation of the probate granted to the executors and in reply were informed that "distribution of the estate had been made." As a result of proceedings taken by the next of kin the probate was ordered to be recalled in December, 1936. An action was instituted for the benefit of the next of kin on December 22, 1937, by the person who had obtained letters of administration against the executors for recovery of £8,450 and interest distributed by them. The executors at all material times believed that the testatrix had testamentary capacity and had acted throughout with perfect honesty.

Held, since the payments to the legatees were made with knowledge and notice of the claim of the next of kin and there was no obligation to pay the legacies by reason of the grant of probate, the executors were liable for the claim.

GIFFORD *v.* WHITTAKER, (1942) 1 All.E.R. 604 (K.B.D.) : (1942) 1 K.B. 501.

Motor Vehicles Regulations, 1937, Reg. 67 (2), 94—"Using the vehicle"—Meaning—Loading done by hirers—Driver—If liable as "using" the vehicle.

The driver of a motor lorry was charged with contravening Reg. 67 (2) of the Motor Vehicles Regulations (1937) in that he had failed to have the load carried by the vehicle he was using so secured that danger was not likely to be caused to any person on the road by

reason of any part of the load falling from the vehicle. The driver was driving the vehicle under instructions of the foreman of a brewery company to whom the lorry was on hire. The employees of the brewery company alone had loaded the vehicle and it was contended by the respondent that it was the foreman of the brewery and not the respondent that was in charge of the vehicle and therefore " using the vehicle ".

Held, that the person using the vehicle was the driver and he was therefore liable.

McMillan *v.* Guest, (1942) 1 All.E.R. 606 (H.L.).

Income-tax Act (1922), Sch. E., R. 6—Director of private company resident abroad—If public officer —Liability to assessment.

A director of a company incorporated under the Companies Act, 1929 is the holder of a public office and that office is located where the company is. Even if the company was a private company the directorship was nonetheless a public office within the United Kingdom. (1940) 4 All.E.R. 452 (C.A.), affirmed.

Fattorini *v.* Inland Revenue Commissioners, (1942) 1 All.E.R. 619 (H.L.).

Income-tax Act (1922), S.21(1)—Only income of company not distributed as dividends—Claim by Crown that it was unreasonable and that income should be deemed to be distributed among members for purposes of income-tax—Onus of proof of unreasonableness.

An investment company, acquired the shares in three commercial companies, chiefly with money borrowed from a bank, on the terms that it should pay over to the bank all the dividends received in respect of all its shares until the indebtedness to the bank for capital and interest was completely satisfied. The certificates of the purchased shares were all deposited with the bank as security along with blank transfers and powers of attorney and a letter of deposit giving the bank an immediate power of sale. The company had no income apart from the dividends on the shares which it had acquired. These dividends, in pursuance of the agreement with the bank, were all paid over to the bank, and the company paid no dividends to its shareholders. The Inland Revenue authorities contended that the company had failed to distribute as dividends " a reasonable part of its actual income " and that the income should be deemed to be the income of its members among whom it shall be apportioned for purposes of income-tax. The contract with the bank was however admitted to be reasonable. In the circumstances,

Held, it was for the Crown to show that it would have been reasonable for the company, notwithstanding its contract with the bank, to raise money by borrowing or otherwise in order to pay a dividend and the company could in fact have raised the necessary money. In the absence of any such evidence the contentions on behalf of the Crown must fail.

When a matter reaches the stage of a stated case, the question is not properly one of onus. It is simply a question of whether the

facts found and stated afford evidence on which the board could properly arrive at their conclusion. (1940) 3 All.E.R. 657, reversed.

FATTORINI *v.* INLAND REVENUE COMMISSIONERS, (1942) 1 All.E.R. 619 (H.L.).

Practice—Statement of case to tribunal—Desirability of separating finding of fact and inferences of facts and law based on them.

It would assist a tribunal, to which a case is referred if the facts found were carefully separated from the inferences of fact and law based upon them and if those inferences themselves were clearly distinguished. In setting out a case it is not legitimate, after stating the facts, to reach a certain conclusion by saying that such and such a thing is found as a fact. Such a final conclusion is not a " fact " but an inference from facts previously set out and therefore that conclusion is not binding upon the tribunal to which the case is referred unless it appears from the previous findings that there are facts which support it. (Per Lord Porter).

OSBORNE *v.* STEEL BARREL CO. LTD., (1942) 1 All.E.R. 634 (C.A.).

Income-tax—Company—Acquisition of stock by issue of fully paid shares—Computation of value of stock for income-tax.

Where the consideration paid by a company for its stock was some cash and some fully paid shares of the company, it was contended for the Crown that the issue of the shares did not cost the company anything and the only thing that the company paid was the cash and the opening stock must be valued accordingly.

Held, that the price paid for the stock must be taken as a sum of cash equal to the par value of the shares. It would have been illegal for the company to have issued shares at a discount.

BEAK *v.* ROBSON, (1942) 1 All.E.R. 639 (C.A.).

Income-tax—Sch. E., R. 1—Director of company—Payment to him of lump sum as consideration for restrictive covenant by him—Assessability.

The respondent entered into an agreement with a company in whose employment he had been for some time, whereby he was to be employed for a term of five years as director and manager, at a salary there stated. The agreement contained clauses under which, in the event of the respondent determining the agreement by notice, as he was entitled under one of its clauses to do, or committing a breach of it which led to a determination, he should not for a stated period, without the consent of the company, be engaged or interested in the business of a coal exporter within a radius of fifty miles. In consideration of this covenant a sum of £ 7,000 was paid. The Crown claimed that it was remuneration from his office of director and manager and taxable accordingly under Sch. E.

Held, that the amount was a separate consideration in respect of the obligation under the covenant and cannot properly be assessed as remuneration from the service.

Re JONES' WILL TRUSTS, JONES *v.* JONES, (1942) 1 All.E.R. 642 (Ch.D.).

Wills—Trust—Gift by reference to existing ascertainable document or to a document which may in the future be substituted therefor—Validity—Tests.

A gift in a testamentary document, by reference to a then existing and identifiable document, may be valid. The later document is incorporated in the former, and may, though not necessarily, be admitted to probate. It is equally clear that a gift in a testamentary document may be made by reference to other documents in such terms as to exclude parol testimony as where the reference is to papers not yet written, or where the description is so vague that it is incapable of being applied to any document in particular. Such a gift is clearly bad. Where in the testamentary document there is a gift by reference to an existing ascertainable document or to a document which may in the future be substituted therefor, the whole gift must be treated as invalid, upon the ground that the testator's testamentary intention can only be ascertained by evidence *de hors* the will itself both in regard to documents existing at the time of the will and to those coming into existence thereafter and as such evidence cannot be admitted about the latter, it ought not to be admitted about the former as otherwise the testator's intention cannot be ascertained as a whole. The gift must fail for uncertainty.

It is not permissible to make a gift in a form which involves power to change a testamentary disposition by an unexecuted codicil.

Re LESTER : LESTER *v.* LESTER, (1942) 1 All.E.R. 646 (Ch.D.).

Wills—Gift subject to payment of annuities—Liability of legatee—Extent.

Where a testator bequeathed certain shares, "subject to the payment of an annuity" to another person, it was admitted that the legatee accepting the legacy is under a personal obligation but it was claimed that a charge was created on the shares.

Held, it must be a question of construction in each case whether an obligation or a charge or both is or are created. The words in the instant case cannot be construed as creating both a personal obligation and a charge. Accordingly there is only a personal obligation.

EARL FITZ WILLIAMS COLLIERIES CO. *v.* PHILLIPS, (1942) 1 All. E.R. 648 (C.A.).

Income-tax—Payment for right to let down surface under mining lease—If "rent" or damages.

The amount agreed to be paid by a colliery company for the right to let down the surface is "rent" as the right was an easement within the Finance Act (1934), S. 21 (4) and not a compensation for damage. (1941) 3 All.E.R. 296, affirmed.

SKELTON AND OTHERS *v.* YOUNGHOUSE AND ANOTHER, (1942) 1 All. E.R. 650 (H.L.).

Wills—Option to purchase given to a named person—If can be exercised by executors of donee.

In the absence of any contrary intention shown in the will an option to purchase some shares in a private company given by a will to a named person is personal to him and does not pass to his executors or constitute a transmissible interest. (1940) 4 All.E.R. 122, affirmed.

DAVIES AND ANOTHER *v.* POWELL DUFFERIN ASSOCIATED COLLIERIES LTD., (1942) 1 All.E.R. 657 (H.L.).

Tort—Negligence—Law Reform Act (1934) and Fatal Accidents Act (1866)—Overlapping of damages—Effect on assessment of damages.

The damages due under the Law Reform Act and under the Fatal Accidents Acts are both in respect of the same negligence, and it is appropriate that any benefit taken indirectly by a dependant by way of participation in an award under the Law Reform Act should be taken into account in estimating the damages awarded to the dependant under the Fatal Accidents Act. [(1941) 1 All.E.R. 278 (C.A.) affirmed.]

BORMAN AND OTHERS *v.* LONDON & NORTH EASTERN RAILWAY Co., (1942) 1 All.E.R. 671 (C.A.).

Railways Act (1921), Sch. III—Amalgamation of Railway Companies —Dismissal of employees on account of retrenchment—If dismissal on account of amalgamation.

Schedule III of the Railways Act provided *inter alia* for compensation for existing employees who suffered loss on account of amalgamation of Railway Companies. Certain employees were dismissed after amalgamation of companies as a measure of retrenchment which would have been done even if there had been no amalgamation. On a construction of the relevant provisions, *held*, that the employees cannot recover compensation thereunder as their dismissal was not an event arising out of the amalgamation.

(1942) 1 All.E.R. 442, affirmed.

EGHAM ELECTRIC CO. *v.* EGHAM URBAN DISTRICT COUNCIL, (1942) 1 All.E.R. 674 (K.B.D.).

Contract—Agreement to supply electricity for public lighting at a fixed sum per quarter—Blackout regulations preventing display of lights and reducing consumption—If entitles consumer to abatement.

Under a contract the plaintiffs were to provide certain things, maintain, repair and paint, streetlights, etc., as well as supply electricity. The defendants were to pay a lump sum each quarter for all such services. The lighting restrictions prohibited the display of lighting on the streets except in certain limited ways. In the circumstances, as there was no provision in the agreement for abatement on such a ground though abatement in certain other events had been provided for, *held*, that the defendants were not entitled to claim any abatement.

HENRIKSEN *v.* GRAFTON HOTEL LTD., (1942) 1 All.E.R. 678 (C.A.).

Income-tax—Profits—Monopoly value of licensed premises—If can be deducted.

The monopoly value of licensed premises is in its nature and quality a capital payment and cannot therefore be deducted from the assessable profits of that business.

(1942) 1 All.E.R. 18, affirmed.

YORKSHIRE DALE STEAMSHIP CO. LTD. *v.* MINISTER OF WAR TRANSPORT: (THE COXWOLD), (1942) 2 All.E.R. 6 (H.L.).

Insurance—Marine policy—Ship requisitioned and sailing in convoy—Alteration of course to avoid enemy action—Stranding by tidal set—Loss if due to war risk or marine risk.

A motor ship, which was requisitioned, stranded while sailing in convoy and it was found that the stranding was not due to the negligence of those on board and that subsequently the ship was taken some miles out of her course by a tidal set. In a claim by the owners for indemnity from the Ministry of War Transport,

Held: (reversing the decision of the Court of Appeal in (1941) 3 All.E.R. 214 and restoring the decision in (1941) 2 All.E.R. 776) the totality of the circumstances causing the loss must be taken into consideration and as there was evidence to support the finding of the arbitrator that the loss was the consequence of a warlike operation it cannot be upset.

WALES *v.* TILLEY, (1942) 2 All.E.R. 22 (C.A.).

Income-tax Act (1918), Sch. E—Commutation of salary and pensions—Assessability of amount received to income-tax.

A company agreed to pay its managing director £ 6,000 per annum and a pension of £ 4000 per annum for ten years after he ceased to be managing director. Subsequently he released the company from the obligation to pay the pension and agreed to serve for £ 2,000 per annum and in consideration for these stipulation the company agreed to pay him £ 40,000, in two equal instalments. It was contended that this amount was a capital receipt and not assessable as profit.

Held: (Mackinnon, L.J., dissenting) by Lord Greene M.R. and Goddard, L.J.: The payment was a profit arising from the office and was therefore assessable under Sch. E of the Income-tax Act.

(1942) 1 A.ll.E.R. 455, affirmed.

LANE *v.* MINISTER OF WAR TRANSPORT, (1942) 2 All.E.R. 28 (C.A.).

Requisitioning—Lorry hired by Crown by the day—Requisition notice—Service—Terminates agreement and entitles Crown to keep the lorry.

Where there is an agreement for the hire of a chattel like a lorry by the Crown under which the Crown was to pay £ 1 per day the hiring being terminable forthwith, the service of a requisition notice by the Crown will terminate the contract of hire and will entitle the Crown to keep the lorry there being no legal objection to the requisition notice. [(1942) 1 All.E.R. 526 and (1942) 1 Ch. 280 affirmed.]

AMAND, *In re* (No. 2), (1942) 1 K.B. 445.

Constitutional Law—Acts of foreign sovereign—Validity—When open to question in English Courts.

A Netherlands subject resident in England was arrested as an absentee from the Netherlands Army. He questioned the validity of the conscription decree by the Netherlands Government then established in England. On the question of jurisdiction, *Held*, it is well settled that Courts cannot question the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction. But when the act, the validity of which is questioned is the act of a foreign government (Netherlands in the instant case) sojourning temporarily by reason of emergency in England and recognised as the legislative authority by the government of England, and the act affects a national of that state resident in England under the protection of the British government and its laws, the circumstances being exceptional, the court can go into the question of the validity of the act of such foreign sovereign, more especially as the Netherlands courts were not functioning.

JOTTINGS AND CUTTINGS.

Magna Carta.—On 15th June, the 726th anniversary of the signing of Magna Carta was celebrated by a notable B.B.C. broadcast showing how this charter has become an intrinsic part of the common law of England. In 1215, said the commentator, the barons and the clergy faced King John at Runnymede and forced him to grant rights to the free men of England. Although at that time not all the inhabitants of England were free, the effect of Magna Carta had since widened, not only to include the whole population of England but also all liberty-loving people throughout the world. The commentator said that probably the barons who united against the king were "building more wisely and more largely than they understood." This concern for liberty, manifest in Magna Carta, in the Bill of Rights, in the Reform Acts of the nineteenth century, and in the Parliament Act, 1911, ensured justice. Less than fifty years after the signing of Magna Carta the great lawyer Bracton explained it to the citizens of London. and it became part of the common law of England. In the American declaration of Independence the rights of life, liberty and property were those of free English citizens. The right to trial by peers was according to the common law of England. In an inspiring address at the conclusion of the programme, the Master of the Rolls, Lord Greene, said that in the Abbey at Tewkesbury there was the story of the barons at Runnymede on the grave of one of the barons. Though much of the wording had been erased by time, the story ended : " Let the king look to it." In framing the laws of England, said Lord Greene, we have turned to the spirit of Magna Carta. The State and the ministers of State were ruled by the law of the State, from which they could not depart, whereas dictatorship was responsible to no law. The law of the land protected the individual : dictatorship did not. No government could influence the decisions of the Judges in our courts, as dictators did. The law of England was made by Parliament elected by the people, and the supremacy of Parliament and the rule of law together produced

freedom. In 1939, said Lord Greene, Lord Lothian had presented a copy of Magna Carta to the World's Fair at New York, and had remarked that Magna Carta was the foundation of American liberty and our own. It was for this liberty that we were fighting together, and Lord Greene warned our enemies, "Let them look to it."—*S.J.*, *1942, p. 183.*

Mr. Justice Langton.—The news of the untimely death of Mr. Justice Langton last week came as a shock to those who knew him, whether as a judge or as a friend. There were many respects in which his life had become distinguished, and there was every reason why he should have looked forward to even greater distinction. He was born on 22nd April, 1881, and was educated at Beaumont and New College, Oxford. In 1905 he was called to the Bar and, having read in Admiralty and Commercial Chambers, he soon distinguished himself in that class of work. When war broke out in 1914 he took a commission in the Royal Garrison Artillery, and was later transferred to War Office Intelligence. In 1916 he became Director of Labour Department and Commissioner for Labour Disputes at the Ministry of Munitions, and in 1918-1919 he was Controller of the Demobilisation Department at the Ministry of Labour. In 1930 he was made a judge of the Probate, Divorce and Admiralty Division, and it is worthy of note that he was the only judge of the Roman Catholic persuasion ever to be a judge of the Divorce Court. It says much for his high sense of duty that he accepted the position only after taking high ecclesiastical advice. For a long time he was a member of the Comite Maritime International, and he also filled the offices of Vice-President of the Council of Legal Education and Chairman of the Board of Studies. He was a brilliant lawyer and a great judge in other fields besides that which he had made peculiarly his own. Many students of case law will remember his incisive judgment in the *Azkarai Mendi*, (1938) P. 263, on the subject of damages for the loss of expectation of life, a subject which he re-examined and elaborated in a profound and scholarly article on the law of compensation in this year's January issue of the *Law Quarterly Review*. The bench and the legal profession have suffered an irreparable loss.—*S.J.*, *1942, p. 237.*

BOOK REVIEW.

BANKING LAW AND PRACTICE IN INDIA, by M.L. Tannan, M. Com., Barrister-at-law, with a Foreword by the Right Hon'ble M. R. Jayakar, 4th edition, published by Butterworth and Co. (India), Ltd., Bombay (1942).

To have written a book to which the student can turn without bewilderment, which the lawyer can study with profit and the businessman can consult without doubt is high achievement indeed which Mr. Tannan the author has accomplished in the book under review. He has spiced the book with a historical and jurisprudential flavour which renders the work really attractive. The writer of a legal text-book has to steer clear of two difficulties. On the one hand he may include within its compass legal topics but remotely bearing on the one sought to be expounded, thereby laying himself open

to the charge of discursiveness. The searchlight which the author flashes on such a wide area tends to leave a blurred impression owing to lack of concentration on the narrow and chosen ground. On the other hand he may confine himself strictly to the thesis which he has chosen and meticulously refrain from touching allied or connected topics, subjecting himself thereby to a possible charge of incompleteness. Mr. Tannan has skilfully steered clear of both these possibilities and struck a happy mean. One or two shortcomings may however be noticed. One might naturally expect in a text-book of this kind a fuller reference to the implied authority of partners in banking partnerships to bind the firm and the liability of the banking firm for misappropriation by individual partners of moneys deposited with the firm, as illustrated by decisions like *Devaynes* v. *Noble*, (1816) 1 Merrivale 530. The law of vicarious liability as applied to banking concerns—for instance, as to how far a bank is responsible for the torts committed by its servants—might also have been usefully adverted to. The recent decision of the House of Lords in *United Australia, Ltd.* v. *Barclay's Bank, Ltd.*, 1941 A.C. 1, as to waiver of alternative causes of action in tort and contract in cases of misappropriation by banks has escaped notice. The vexed question of cheques paid in respect of gambling and other transactions might have been touched upon and the difference in this connection between void dealings which do not and illegal dealings which do taint collateral transactions and deprive *bona fide* transferees of their remedy might have been alluded to. These points do not in any way detract from the merit of the work which is considerable and its usefulness which is real. This is amply borne out by the rapid passage of the book through four editions within a comparatively short period. The case-law has been brought up-to-date and an index of cases and a general index are also given. It is with pleasure that we are able to endorse Mr. Jayakar's observation in his Foreword that the book "has occupied a coveted place as a standard work on Indian Banking Practice."

"The Transfer of Property Act" by Chitaley and Annaji Rao, All India Reporter, Nagpur.

We acknowledge with thanks the receipt of the first volume of the Transfer of Property Act by Messrs. Chitaley and Annaji Rao. The learned authors have already familiarised themselves to the legal world by their commentaries on the Civil and Criminal Procedure Codes. The Transfer of Property Act is the authors' latest contribution on the subject. The volume under review shares with its predecessors the comprehensiveness and assiduous collection of all the available case-law relating to the matter. This last feature, *viz.*, that all the matter bearing on the subject in the form of all the decisions is brought in, has the effect of rendering superfluous a reference to the digests. The special features of the work have been pointedly set out in the wrapper pages. Altogether, it is a useful contribution by way of commentary upon a rather difficult branch of the law.

One word, however, as regards the citation of cases. The omission of references to provincial local journals, even of those which have a place of prime, would appear to detract from the utility of the work as a ready reference on the subject.

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NOTES OF INDIAN CASES.

KRISHNAN CHETTIAR *v.* AMMALU AMMA, (1941) 2 M.L.J. 472.

This case decides a question of more than passing interest. It holds that if there is a karnavan capable of acting and he has not renounced either directly or by implication he alone can bind the family by his acts and no other member of the tarwad, not even one performing minor acts of management, can alienate tarwad property even if it be for a family necessity. The proposition, if sound, will have far reaching effect and will be liable to be invoked with regard to the acts of junior members of a Mitakshara joint family as well. The text of Brihaspati,[1] which is generally regarded as the foundation of the rules relating to alienation by coparceners states:—"Even one person may conclude a gift, hypothecation or sale of immovable property during a calamity or for the sake of the family or for indispensable religious duties". There is nothing in the text to suggest that the alienating member should have the status of a manager. The purpose of the alienation and not the status of the alienor would seem to be the determining factor. "For where family necessity exists, that necessity rests upon the coparceners as a whole and it is proper to imply a consent of all" of them to that act of the one which such necessity has demanded, *Sahu Ram* v. *Bhup Singh.*[2] The touchstone of authority is necessity and if the alienor has acted as a prudent owner for the benefit of the family, the other members must be bound by his acts, see *Mudit Narayan Singh* v. *Ranglal Singh.*[3] There is also express textual authority:—"Should even a *dependent member* enter into a transaction for the need of the family, the head of the family should not set it aside".[4] It cannot be that an alienation of family property for a justifiable cause cannot bind the family merely because it is made by a junior member. It has in fact been recognised that if the manager or karnavan is acting prejudicially to the interests of the family, a junior member may validly pledge the family credit for protecting the family interests, *Raja of Arakal*

1. Cit. in Mitakshara, Ch.I, S. 1, Cl. 28.
2. (1917) I.L.R. 39 All. 437, 443 (P.C.).
3. (1902) I.L.R. 29 Cal. 797.
4. Brihaspati cited in the Viramitrodaya.

v. *Churia Kunhi Kannan.*[1] Likewise a junior member who had been suffered to deal with the family property as if the power of the karta had gone has been held competent to bind by his acts the other members of the family, *Mudit Narayan Singh* v. *Ranglal Singh.*[2] So also even where there is a manager if a junior member had been put in charge of a family business it has been recognised that in regard to that business and for its purposes, he can validly borrow so as to bind the family, to the extent necessary for the proper conduct of the business of which he is in charge, see *Sheo Pershad Singh* v. *Saheb Lal,*[3] *Ramakrishna Mudaliar* v. *Manikka Mudaliar.*[4] No doubt to allow any and every junior member irrespective of his credentials to alienate family property ostensibly on the ground of family necessity may cause inextricable confusion in the joint family affairs and cut at the powers of the manager and afford scope for considerable litigation. That, however, can be no reason why in a case where necessity stands proved and the manager could not easily be got at, a junior member shall not have the power to bind by his acts the other members. To suggest that before a junior member can act, there should have been an abdication by the manager either expressly or by implication, irrespective of need or urgency, is to put the matter rather widely and is not warranted by the authorities.

KANAKARATNAM *v.* NARASIMHA RAO, (1941) 2 M.L.J. 803 (F.B.).

This is a Full Bench decision holding that the motive of a widow in adopting can be ignored where she possesses authority to adopt. The point would have been bereft of importance but for some tortuous language employed in early rulings of the Privy Council which became the subject of conflicting interpretations. It is indisputable that according to the shastras adoption secures spiritual benefit. It is equally indisputable that where the adopter is a male his motive is irrelevant, *Raja Makund Das* v. *Sri Jagannath Jenamoni.*[5] It is also the law that the underlying motive cannot be examined where a widow possessing her husband's authorisation adopts. Is there then any reason why the case of a widow adopting with the consent of her husband's sapindas should stand on a different footing? Considering that adoption is only a method by which a married couple can have a child it seems incongruous that a Court of law should concern itself with the underlying motive and question whether it was caprice or corruption, see *Krishnayya Rao* v. *Raja of Pittapur.*[6] As was tersely put by Jackson, J., "if an adoption is regarded as a form of birth the logical conclusion would seem to be . . . that the widow's motive in making an adoption is no more material than a wife's motive in having a baby," *Murahari Brahma Sastri* v. *Sumitramma.*[7]

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1. (1915) 29 M.L.J. 632.
2. (1902) I.L.R. 29 Cal. 797.
3. (1892) I.L.R. 20 Cal. 453.
4. (1937) 1 M.L.J. 587, 594.
5. (1923) I.L.R. 2 Pat. 469.
6. (1928) 55 M.L.J. 894: I.L.R. 51 Mad. 893, 950 (F.B.).
7. (1933) 66 M.L.J. 577: I.L.R. 57 Mad. 411, 426.

Religious benefit being caused to the husband by the adoption any discussion of the widow's motives would *prima facie* be irrelevant. The test should always be objective only, not what weighed with the adopter but what its effect will be with reference to the deceased husband. In some cases the facts may be such as to justify the Court in presuming that bad motives had influence in the widow's mind, but who can ever say that she was not also influenced by good motives, *Ramachandra* v. *Mulji Nanabhai.*[1] Where the motives are of a mixed character the adoption should not be held invalid, *Mahableshwar* v. *Durgabai.*[2] In fact no widow's adoption can stand scrutiny if her motives are important, *Anne Brahmayya* v. *Chelasami Ratayya.*[3] In the *Ramnad case,*[4] however, the Judicial Committee had observed that where a widow seeks to adopt with the consent of her husband's sapindas, there should be such evidence of the assent of the kinsmen as suffices to show "that the act is done by the widow in the proper and *bona fide* performance of a religious duty and neither capriciously nor from corrupt motives". In *Sri Virada Pratapa Raghunadha Deo* v. *Sri Brozo Kishore Patta Deo,*[5] it was further stated: "It may be the duty of a Court of Justice to consider the religious duty of adopting a son as the essential foundation of the law of adoption. . . . But it is impossible not to see that there are grave social objections to making the succession of property . . . dependent on the caprice of a woman. . . . It seems therefore to be the duty of the Courts to keep the power strictly within the limits which the law has assigned to it." These remarks are liable to be understood, as indeed they have been understood, that the motive of a widow in making an adoption may be scrutinised in each case. Observations in later decisions of the Privy Council indicate that such a construction was not intended. Adverting specifically to the question, in *Vellanki Venkatakrishna Rao* v. *Venkata Rama Lakshmi,*[6] Sir James Colvile remarked that it would be very dangerous to introduce into the consideration of these cases nice questions as to the particular motives operating on the mind of the widow and that what was stressed in the *Ramnad case* was not that there should be evidence of the widow's motive but that there should be evidence of such assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow after a fair consideration by what may be called a family council of the expediency of substituting an heir by adoption to the deceased husband. In other words there should be proof that in assenting to the adoption the sapindas did not act selfishly, frivolously, maliciously or without bestowing thought but acted after deliberation being satisfied that it was desirable and expedient to have a son affiliated to the deceased by an adoption by his widow, and that if the sapindas had sanctioned the adoption without such deliberation, then such sanction will be futile. In *Sri Krishnayya Rao* v. *Surya*

1. (1896) I.L.R. 22 Bom. 558.
2. (1896) I.L.R. 22 Bom. 199.
3. (1924) 20 L.W. 503, 516.
4. *Collector of Madura* v. *Mootoo Ramalinga,* (1868) 12 M.I.A. 397, 441 (P.C.).
5. (1876) I.L.R. 1 Mad. 69, 83 (P.C.).
6. (1876) I.L.R. 1 Mad. 174 (P.C.).

Rao Bahadur Garu,[1] Sir George Lowndes has pointed out: "She is said not to have made the adoption for the benefit of her husband or upon religious grounds, but merely in order to get hold of a substantial part of the property. Their Lordships doubt if, where the consent of the sapindas has been obtained, the motive of the adopting widow is relevant." In another case, *Vijaysinghji Chatrasinghji* v. *Shivsangji*,[2] the Privy Council remarked: "There is no evidence to prove any improper motive, and if the adoption causes harm to the plaintiff it nevertheless confers spiritual benefit upon the husband." These statements coupled with their Lordships' interpretation of their remarks in the *Ramnad case* do lend colour to the view taken in *Hari Ramayya* v. *Venkatachalapati*,[3] that the only person whose motive requires to be canvassed is the sapinda who either gives his consent or withholds his consent and not the widow. It is submitted that to regard this conclusion as "going too far" as has been suggested in the instant decision (see p. 807) is not quite justified. In Madras on the question of the widow's motive in adopting, there were till recently conflicting pronouncements. Some decisions—see *Anne Brahmayya* v. *Chelasami Ratayya*,[4] per Kumaraswami Sastri, J., in *Krishnayya Rao* v. *Raja of Pittapur*[5]—had suggested that motive is irrelevant. A number of other decisions took a contrary view, see majority view in *Krishnayya Rao* v. *Raja of Pittapur*,[5] *Kandasami Goundan* v. *Chinnammal*,[6] *Murahari Brahma Sastri* v. *Sumitramma*,[7] *Mangamma* v. *Ramanamma*.[8] The pronouncements in Bombay, in *Patel Vandravan Jekisan* v. *Patel Manilal Chunilal*,[9] *Mahableshwar* v. *Durgabai*,[10] *Ramchandra* v. *Mulji Nanabhai*,[11] that the widow's motive was irrelevant were explained away as due to the fact that in that presidency a widow's power to adopt was inherent and not derivative. In *Annapurnamma* v. *Appayya Sastri*[12]—a Full Bench decision—it was held that if the evidence bearing on consent leads to the conclusion that the motive which actuated the widow in making the adoption was to defeat the reversionary interest of the sapindas then the adoption would necessarily be invalid. The later decisions in Madras favouring this view took their stand on precedents in this presidency while the earlier decisions placed reliance on the observations in the *Ramnad case*. The interpretation put on the latter case by the Privy Council in the *Guntur case*,[13] coupled with its remarks in *Sri Krishnayya Rao* v. *Surya Rao Bahadur*[1] and *Vijaysinghji Chatrasinghji* v. *Shivsangji*,[2] show that such a view is no longer tenable.

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1. (1935) 69 M.L.J. 388 (P.C.).
2. (1935) 68 M.L.J. 701: L.R. 62 I.A. 161: I.L.R. 59 Bom. 360, 365 (P.C.).
3. (1935) 70 M.L.J. 619.
4. (1924) 20 L.W. 503.
5. (1928) 55 M.L.J. 894: I.L.R. 51 Mad. 893 (F.B.).
6. (1933) 37 L.W. 729.
7. (1933) I.L.R. 57 Mad. 411: 66 M.L.J. 577.
8. (1934) 69 M.L.J. 602.
9. (1891) I.L.R. 15 Bom. 565.
10. (1896) I.L.R. 22 Bom. 199.
11. (1896) I.L.R. 22 Bom. 558.
12. (1928) 56 M.L.J. 760: I.L.R. 52 Mad. 620 (F.B.).
13. (1876) I.L.R. 1 Mad. 174 (P.C.).

SARADAMBAL *v.* SUBBARAMA AIYAR, (1941) 2 M.L.J. 862.

It is possible to take a view different from the conclusion arrived at in this case, that where a Hindu dies having at the time of his death an interest in joint family property and by the operation of S. 3 of the Hindu Women's Rights to Property Act, 1937, his widow becomes entitled thereto, such interest in her hands is liable to be attached and sold for the satisfaction of the debts of the deceased. In regard to the liability of a person's property after his death for his debts it is well settled that if it consisted merely of an undivided interest in a Mitakshara coparcenary the creditor can seek satisfaction from such interest only if during the lifetime of his debtor he had obtained a decree and at least attached his undivided interest. Survivorship will otherwise operate and the interest will pass beyond the reach of the creditors, the only exception to the rule being the case of a father and son founded on the pious obligation rule. Such being the case, the nature of the succession when a widow becomes entitled to her husband's coparcenary interest under S. 3 (2) of the Hindu Women's Rights to Property Act becomes material. Does she take as in a case of inheritance or does she take by survivorship and if it is in the latter mode is there any principle analogous to the pious obligation rule by which such interest in her hands would become available to the creditor for satisfaction of her husband's debts? The doctrine of pious obligation with its corollary of right by birth rests on the relationship of persons as father and son and can hardly be applied to a case of husband and wife unless it be that on marriage the wife can be regarded as becoming a co-owner with the husband. Texts of Apasthamba,[1] Datta and other sages no doubt lend colour to the theory of co-ownership between the spouses but as a legal doctrine it has nowhere been accepted. Not being a co-owner it follows that the widow does not take by survivorship. Consequently no impediment that way can arise to bar the husband's creditor from proceeding against his interest in the joint family property. S. 3 (2) of the Hindu Women's Rights to Property Act enacts that "when a Hindu . . . dies intestate having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-S. (3), have in the property the *same* interest as he himself had. 'Same' means 'identical', 'not differing in kind', 'like in quality'. It follows that the widow takes the interest with all the incidents which it had possessed originally, subject only to the modification imposed by sub-S. (3), namely, that it is to be a Hindu woman's estate with however the *same right* of claiming partition as a male owner. In the case of a male owner to call for partition rests on his discretion. Till the call is made he can have the benefit of survivorship and his interest quantitatively is inchoate and unascertained. The interest would become available to a creditor only if he had obtained a decree against the coparcener and attached it while he was alive. Since the widow is conferred "the same right of claiming partition as a male owner" it must follow that till she does so the incidents described above that had attached to that interest will *mutatis*

1. II, 6, 14, 16-20.

mutandis continue. The right to partition available to her will be that of a Mitakshara coparcener and comprises both the right to stop with a disruption in status only or to ask for a division by metes and bounds. On this hypothesis it would seem that the widow is not to have a position analogous to that occupied by her *vis a vis* under the Dayabhaga law as the holder of a partitioned succession but is to acquire one comparable in every way to that of a male coparcener subject only to restrictions on her power of alienation. The case of an illegitimate son becoming a coparcener with a legitimate son of his father in regard to the paternal properties—see *Jogendro* v. *Nityanand*[1]—on the father's death shows that there is nothing repugnant in holding that though the widow was no co-owner while her husband was alive she may on his death become a co-owner with the other members of the joint family, though the quality of the interest possessed by her is different from that of the others. To hold otherwise would result in interpreting S. 3 as giving the widow not the same but a different type of the right of claiming partition. The observations of Sir Barnes Peacock in *Moniram Kolita* v. *Keri Kolitani*[2]:—"According to the Hindu law a widow who succeeds to the estate of her husband in default of male issue, *whether she succeeds by inheritance* or *by survivorship,* does not take a mere life-estate in the property. The whole estate is for the time vested in her absolutely for some purposes, though in some respects for a qualified interest"—do not militate against the construction of S. 3 suggested above. Thus under S. 3 (2), the widow does not take by survivorship; nor does she take as in the ordinary course of inheritance. It is also noteworthy that while sub-S. (2) confers on her the 'same interest' as her *husband* had, sub-S. (3), gives her 'the same right of claiming partition as *any male owner.*' In regard therefore to the liability for the husband's debts, the interest being un-severed and her status being that of a coparcener and her rights that of any male owner, unless something had been done to sequestrate the interest prior to the husband's death as by attachment in execution of a decree obtained against him, it will cease to be available to the creditor. To argue as has been done in the instant case that if a son taking his father's interest by survivorship would hold the interest subject to the liability of its being attached and sold for his father's debts it would be unreasonable to allow a widow to stand in a better position overlooks the fact that the son enjoys an advantage in another direction, namely, that he takes absolutely and thus is in a superior position. There is the further fact that Act XVIII of 1937 is intended to improve the position of women and cannot be read so as to enlarge the rights of creditors. A statute is *prima facie* to be construed as changing the law to no greater extent than its words or necessary intendment require, see *Secretary of State for India* v. *Bank of India.*[3] These reasons suggest that S. 3 (2) may justifiably receive a construction different from that adopted in the decision under notice.

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1. (1890) L.R. 17 I.A. 128: I.L.R. 18 Cal. 151 (P.C.).
2. (1880) L.R. 7 I.A. 115: I.L.R. 5 Cal. 776 (P.C.).
3. (1938) 2 M.L.J. 169: L.R. 65 I.A. 286, 298: I.L.R. (1938) Bom. 502 (P.C.); *see also* Maxwell on Interpretation, 7th Edn., p. 204.

VENKATRAMAYYA *v.* SESHAYYA, (1941) 2 M.L.J. 877.

This case discusses the question whether a Hindu father who became a convert to Christianity and later on reverted to Hinduism can by his reconversion restore the coparcenary relationship between himself and his son. The re-union contemplated by the texts of Hindu law is one resting on the intention of the parties to the original partition to re-unite and even then will be permissible not with any person indifferently but with certain persons only—see *Ram Narain* v. *Pan Kuer.*[1] Being founded on mutual intention there can be no re-union with a minor,—see *Bala Bux* v. *Rukhmabai,*[2] *Venkata Reddi* v. *Kuppa Reddi.*[3] The father, however, in Hindu law possesses *qua* father the power to effect a partition among his sons *inter se* irrespective of their volition.[4] Likewise he has the unqualified power to give away his sons in adoption and thereby alter their status and position. If the status of a minor son can thus be altered by the father in virtue of his parenthood and independently of the son's wishes can it not be said that the father's power to affect his son's status by a compulsory partition will include the power to restore him to his original status by re-union and that the case of father and son stands outside the doctrine of intention altogether? In *Babu* v. *Gokuldoss Govardhandoss,*[5] Venkatasubba Rao, J., remarked—"It is then urged that it is contrary to principle to hold that the father by re-union can affect the son's status. The Hindu law does recognise the father's power to alter the son's joint family status into one of separation. There is nothing inherently illogical in the father therefore possessing the power of converting his son's status of a separated member into that of a re-united member." These observations are general and may not admit of being distinguished merely on the ground that the case in question was not one of re-union between father and son. In any event the opinion of Venkatasubba Rao, J., may avail only to the extent of holding that if in the exercise of his volition a father disrupts the joint status between himself and his minor son, then, by another unilateral exercise of volition on his part he can restore the minor son to his original status. Where however the initial severance is not by act of party but by operation of law such as on conversion, will the case stand on a different footing? In *Abraham* v. *Abraham,*[6] Lord Kingsdown observed:—"What is the position of a member of a Hindu family who has become a convert to Christianity? He becomes as their Lordships apprehend at once severed from the family. . . . The tie which bound the family is, so far as he is concerned not only loosened, but dissolved. The obligations consequent upon and connected with that tie must as it seems to their Lordships be dissolved with it." Conversion is thus on a par with partition as regards its legal effects. No doubt on conversion a father does not lose his power to give his Hindu

1. (1935) 68 M.L.J. 139: L.R. 62 I.A. 16: I.L.R. 14 Pat. 268 (P.C.).
2. (1902) L.R. 30 I.A. 130: I.L.R. 30 Cal. 725 (P.C.).
3. (1918) M.W.N. 680.
4. Mitakshara I—ii—2; *ibid.*, I—vi—7.
5. (1928) 55 M.L.J. 132.
6. (1863) 9 M.I.A. 199 (P.C.).

son in adoption—see *Sham Singh* v. *Santa Bai*,[1] *Kusum Kumari* v. *Satya Ranjan*.[2] It has however been nowhere recognised that even after conversion to an alien faith a father can still bring about a partition among his sons *inter se*, by merely getting reconverted or otherwise. The analogy afforded by a father (of a minor son) marrying under the Special Marriage Act, 1872, as amended in 1923 is also suggestive. The father will by operation of the statute become severed from the son and it will be impossible to maintain that he will have still the parental power to restore the joint status by re-union, since the parties will then be subject to different laws in relation to their property. It is not thus as if every parental power would continue after conversion. The parental power being lost by the conversion, a re-conversion on his part to his original faith cannot remit the parties to their original status. Conversion may operate as a partition but re-conversion cannot act as a re-union.

EMPEROR *v.* GORDHAN KALIDAS, I.L.R. (1942) Bom. 7.

This case deals with a point on which there is a conflict of judicial opinion. It holds that it is not requisite for the purposes of S. 373, Indian Penal Code, dealing with the offence of buying, hiring or otherwise obtaining possession of a minor for purposes of prostitution that the possession of the minor should have been obtained *from a third person*. S. 373 occurs in the chapter dealing with offences against the human body and along with S. 372 is presumably intended to cover the case of trafficking in minor girls. At first sight, an examination of its language suggests that it is a counter-part of S. 372 and cannot be treated as self-contained. The wording of the two sections is extremely close. It looks as if "sells" in S. 372 corresponds to "buys" in S. 373 and "lets to hire" in the former section is in juxta-position to "hires" in the latter. It would therefore be a somewhat strained interpretation to hold that "otherwise obtains possession" in S. 373 does not correspond to "otherwise disposes of" in S. 372. In other words, "otherwise obtains possession" should be understood *ejusdem generis* with "buying" and "hiring," *Jateendra Mohan Das* v. *Emperor*.[3] Buying and hiring of a minor are certainly transactions of which the minor is the object and other parties are subjects. There is much reason in what Holloway, J., said in *Dowlath Bee* v. *Sheik Ali*,[4] namely to bring a case within S. 373 possession must be obtained from a third party for a minor *ex vi termini* is incapable of binding herself by any contract. This view of Holloway, J., receives support from the later rulings in Madras, see *The Public Prosecutor v. Maddila Mutyalu*.[5] A contrary view of the meaning of "otherwise obtains possession" in S. 373 has been taken in a number of other decisions, see *per* Scotland, C.J., in *Dowlath Bee* v. *Sheik Ali*,[4] *Emperor* v.

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1. (1901) I.L.R. 25 Bom. 551.
2. (1903) I.L.R. 30 Cal. 999.
3. I.L.R. (1937) 2 Cal. 187.
4. (1870) 5 M.H.C. 473.
5. (1918) 35 M.L.J. 157.

Shamsundaribai,[1] *Sham Sunder Prusti* v. *Emperor*,[2] *Bhagchand Jasraj* v. *Emperor*.[3] These decisions purport to proceed on what is characterised as the "plain language" of the section untrammelled by other considerations. In *Bhagchand Jasraj's case.* Beaumont, C.J., while recognising that regard must be had to S. 372, in construing S. 373, nevertheless states that that would not justify a departure from the plain words of the latter section. This altogether ignores the principle that the words take colour from the context and that particularly in the case of penal statutes it may not be justifiable to construe the section apart from its intendment or object. For these reasons the construction of the words "otherwise obtains possession" in S. 373 suggested by Holloway, J., in *Dowlath Bee's case* seems to be preferable to that adopted in the decision under notice.

EMPEROR *v.* KARSAN JESANG, I.L.R. 1942 Bom. 22.

The decision in this case turns on the construction of the latter part of S. 211, Indian Penal Code, over which there are a number of conflicting rulings. It holds that for a case to fall within the second part of S. 211, criminal proceedings must have been instituted in a *Court* on a false charge and that if a case got no further than a police inquiry it will not fall within that part. S. 211 is laid in two parts. The first portion deals with cases where a person with intent to cause injury to another, *institutes* or *causes to be instituted* any criminal proceedings against that person or *falsely charges* such person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge. The second half of the section provides for a heavier punishment being awarded *if such criminal proceeding be instituted* against a person *on a false charge* of an offence punishable with death, transportation, etc. The question is as to the interpretation to be given to the words "if such criminal proceedings be instituted." While the Calcutta, Madras, Patna, Sind and Oudh rulings as well as a recent pronouncement of the Allahabad High Court have adopted the view that a person can be held to have 'instituted' proceedings within the meaning of S. 211 if he had set the criminal law in motion by making a false charge to the police of a cognisable offence though the matter might have been carried no further after the police investigation, the Allahabad, Rangoon and Nagpur Courts have taken a different view. Viewed literally the language of the section seems to afford support to the Allahabad view. The first part of S. 211 covers two types of cases, namely, (1) instituting or causing to be instituted a criminal proceeding, and (2) falsely charging a person of having committed an offence. We must take it that the Legislature did not regard the phrases "institutes" or "causes to be instituted" and "falsely charges" as co-terminus. They refer to different cases though they might not be wholly exclusive. Of these, the second phrase alone occurs in the latter part of the section. The inference is therefore suggested that falsely charging a person by

1. (1920) I.L.R. 45 Bom. 529.
2. A.I.R. 1930 Pat. 219.
3. (1934) I.L.R. 58 Bom. 498.

a complaint to the police is not intended to fall within the latter part of S. 211 as it stands distinguished from instituting a criminal proceeding in the text of the first part of the section, and that instituting a criminal proceeding involves a prosecution before the Magistrate. Favouring a literal construction the Allahabad High Court has held in *Queen Empress* v. *Bisheshar*.[1] that where the offence committed does not go further than the making of a false charge to the police, the making of such a charge will not amount to the institution of criminal proceedings;—see also *Empress of India* v. *Pitam Rai*,[2] *Empress* v. *Parahu*,[3] *Emperor* v. *Jagmohan*,[4] *Barkatullah* v. *Sadho Kalwar*.[5] The Rangoon High Court has held that the expression "institutes criminal proceedings" can have reference only to proceedings before a Magistrate, *The King* v. *Ma Ban Gyi*.[6] In Nagpur, in *Sultan Ahmed* v. *Emperor*,[7] it was laid down that investigation by the police will not be a criminal proceeding against any person and setting the criminal law in motion by making a false charge to the police of a cognisable offence against a person does not amount to the institution of criminal proceedings. In Calcutta, the earlier rulings in *Queen* v. *Bonomali Sahai*,[8] *Raffee Mahomed* v. *Abbas Khan*,[9] *In the Matter of the petition of Kader Baksh*[10] had all held that even the laying of a complaint before the police will amount to the institution of criminal proceedings. A later decision in *Queen Empress* v. *Karim Baksh*[11] took a different view and the question then fell to be considered by a full bench of five Judges in *Karim Baksh* v. *The Queen Empress*,[12] which affirmed the earlier view. The reasoning of the Full Bench was as follows: There are two modes under the Criminal Procedure Code in which an aggrieved person may seek to put the criminal law in motion, namely, either by giving information to the police (S. 154) or by laying a complaint (S. 191) before a Magistrate. Whichever mode is adopted the accuser is the same and the first step taken by him is also the last since from that time the control of the investigation or inquiry passes out of his hands, subject to this, that in the first mode if the result of the police investigation is against him, he may renew his complaint to the Magistrate. The two categories referred to in the first part of S. 211, "instituting criminal proceedings" and "falsely charging" cannot thus be mutually exclusive, for there is no mode by which a private accuser can institute criminal proceedings except by a charge and the latter part of S. 211 expressly speaks of "such proceedings instituted on a false charge." The latter phrase should therefore be understood to refer not to any one of the categories found in the first part

1. (1893) I.L.R. 16 All. 124.
2. (1882) I.L.R. 5 All. 215.
3. (1883) I.L.R. 5 All. 598.
4. (1908) 6 All.L.J. 989.
5. (1912) 17 I.C. 791.
6. (1938) Rang.L.R. 236.
7. A.I.R. 1931 Nag. 134 (F.B.).
8. (1866) 5 W.R.Cr. 32.
9. (1867) 8 W.R.Cr. 67.
10. (1874) 21 W.R.Cr. 34.
11. (1885) I.L.R. 14 Cal. 633.
12. (1888) I.L.R. 17 Cal. 574 (F.B.).

of the section only but to all of them. Following *Karim Baksh's case* in *Queen Empress* v. *Nanjunda Rao*,[1] the Madras High Court has observed that there is no warrant for holding that the words "institutes criminal proceedings" should be limited to the bringing of a charge before the Magistrate or to action by the Magistrate or police against the person charged; see also The *Sessions Judge of Tinnevelly Division* v. *Sivan Chetti*.[2] Likewise in *Parameshwar Lal* v. *King Emperor*[3] it has been held by the Patna High Court that a charge laid before the police without anything more will amount to instituting criminal proceedings within the meaning of S. 211. In *Dharamdas Hiranand* v. *Emperor*[4] the opinion has been expressed that no distinction should be drawn between the first and second parts of S. 211, between proceedings before the police and proceedings before the Magistrate. A similar view is to be found in *Balak Ram* v. *Emperor*.[5] The latest pronouncement of the Allahabad High Court in *Emperor* v. *Johra*[6] has dissented from the earlier rulings of that Court and adopted the construction of S. 211 as laid down by the Calcutta High Court on the ground that the weight of authority was heavily in favour of that view. The learned Judges also point out that the definition of "investigation" in S. 4 (1) (*l*) of the Criminal Procedure Code, shows that criminal proceedings include investigations by a police officer. This decision of the Allahabad High Court and its repudiation of the earlier Allahabad view have not been noticed in the instant decision. The different views held on the matter were adverted to in Bombay, in *Imperatrix* v. *Jijibhai Govind*[7] but the matter was left open. In view of the conflicting decisions on the scope of the latter part of S. 211 it is desirable that the doubt should be resolved either by suitable amendments to the section or by a decision of the Privy Council.

EMPEROR v. NINGAPA RAMAPPA KURBAR, I.L.R. 1942 Bom. 26.

A notable point concerning the powers and constitution of a full bench is raised by Beaumont, C.J., in this case. He points out that it would seem anomalous to hold that a later full bench can over-rule an earlier full bench merely because the later bench consists of more Judges than the earlier. It will be much more so where for instance the earlier ruling was a unanimous one of five Judges while the later pronouncement was that of a full bench of seven Judges by a majority of four to three. Apart from the legal question whether a later full bench can over-rule an earlier full bench, even numerical superiority in such a case will be with the sponsors of the earlier view. In fact the observations of Beaumont, C.J., fell to be made in connection with the effect of a full bench decision in *Emperor* v. *Purshottam Iswar*[8]

1. (1896) 7 M.L.J. 16: I.L.R. 20 Mad. 79.
2. (1909) I.L.R. 32 Mad. 258.
3. (1925) I.L.R. 4 Pat. 472.
4. I.L.R. (1939) Kar. 711.
5. (1941) 196 I.C. 262 (Oudh).
6. A.I.R. 1931 All. 269.
7. (1896) I.L.R. 22 Bom. 596, 599-600.
8. (1920) I.L.R. 45 Bom. 834 (F.B.).

where by a majority of four to one, a view different from that held unanimously by a full bench of four Judges in *Queen Empress* v. *Murugappa bin Ningappa*[1] came to be laid down. There seems very little authority on the powers and constitution of a full bench. There can be no doubt that a full bench must consist of three or more Judges. Rule 5 of the Madras High Court Appellate Side Rules, for instance, provides that a full bench shall be a bench of any number not less than three of the Judges for the time being present as Judges of the Court. It is also indisputable that a full bench can over-rule a division bench and that where a question had been referred to a full bench and answered it will not be open to a division bench to treat the answer to it as an *obiter dictum* merely—see *Raja of Mandasa* v. *Jagannayakulu.*[2] Where however a division bench feels that the ruling of a full bench requires to be reconsidered the proper procedure will be to refer the matter to the Chief Justice who at his discretion may constitute a *special* and *larger* bench, *ibid.* In stating the practice of the Calcutta High Court in these matters, Sir Lancelot Sanderson, C.J., has observed in *Enatullah* v. *Kowsher Ali*[3] that a decision of a full bench could only be upset by the Privy Council or *by a bench specially constituted by the Chief Justice to consider the matter.* An earlier full bench view can be reversed by a special bench,[4] but even then, it stands to reason that the later decision to have that effect must be that of a larger number of Judges subscribing to that view than the number of Judges actually responsible for the earlier view. In the course of his judgment in *Amirthammal* v. *Vallimayil Ammal*[5] where incidentally the effect of the observations of a full bench of three Judges in *Pudiava Nadar* v. *Pavanasa Nadar*[6] on a point in variance with the view expressed in a unanimous decision of an earlier full bench of five Judges in *Krishna v. Sami*[7] had to be considered, Sir Lionel Leach, C.J., remarked: "I am not prepared to accept *Pudiava Nadar* v. *Pavanasa Nadar*[6] in preference to *Krishna* v. *Sami*[7] where the two decisions conflict, but even if I were so inclined, I should not be able to follow *Pudiava Nadar* v. *Pavanasa Nadar*[6] because the decision in *Krishna* v. *Sami*[7] is a decision of a larger bench and *therefore* is an over-riding authority." Even where the later ruling is that of a larger special bench it cannot in reason upset an earlier full bench, unless the number of Judges actually subscribing to the view formulated as the decision of the special bench is larger than that responsible for the view in the earlier full bench.

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1. (1893) I.L.R. 18 Bom. 377 (F.B.).
2. (1931) I.L.R. 55 Mad. 883: 63 M.L.J. 450 (F.B.).
3. (1926) I.L.R. 54 Cal. 266.
4. *Chandra Binode Kundu* v. *Sheik Ala Buz Dewan,* (1920) 24 C.W.N. 818, 852 (S.B.).
5. S.A. No. 844 of 1938 (F.B.).
6. (1922) 45 Mad. 949: 43 M.L.J. 596 (F.B.).
7. (1885) 9 Mad. 64 (F.B.).

In the matter of RATANJI RAMAJI, I.L.R. 1942 Bom. 39 (S.B.).

A point of considerable public importance forms the subject of decision in this case which holds that the High Court can in the exercise of its inherent jurisdiction arising out of the Crown's prerogative as *parens patriae* to protect those who cannot protect themselves appoint a guardian of the interest of a minor coparcener in a Hindu joint family property and sanction an alienation of the minor's interest by the *karta* if such alienation will be in the minor's interest, and that such jurisdiction extends to minors and their property whether resident or situate within or without the limits of the High Court's ordinary original civil jurisdiction. It is now well settled that under Hindu law, a guardian cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitakshara family, *Gharibullah* v. *Khalak Singh.*[1] The power, if any, which the Court may have in this respect has therefore to be sought outside the principles of Hindu law and such power, if existing, stands expressly saved by section 3 of the Guardians and Wards Act, 1890 in the case of the High Courts established under the statute 24 and 25, Vic. c. 104. It was provided by section 9 that the High Court shall exercise all such powers as shall be granted by the Letters Patent and except as otherwise provided therein, it shall have and exercise *all jurisdiction vested in the Supreme and Sudder Courts.* Cl. 17 of the Letters Patent of 1865, stated that the High Court shall have the like power with respect to infants and others in the province as was vested in the High Court immediately prior to the publication of the Letters Patent, *i.e.,* the power that it had under Cl. 16 of the Letters Patent of 1862, which had stated that the Court should have the same jurisdiction as was then vested in the Supreme Court. The powers vested in the Supreme Court were the same as those possessed by the Courts of Chancery in England—*See* Cl. 25 of the Charter of 1774, establishing the Supreme Court at Fort William, Cl. 32 of the Charter of 1800, constituting the Supreme Court at Madras and Cl. 37 of the Charter of 1823 relating to the Supreme Court at Bombay. As was observed in *Annie Besant* v. *Narayaniah,*[2] "the jurisdiction in connection with the estates and persons of minors is.. . . . . the jurisdiction which was exercisable by the Lord Chancellor in England acting for the sovereign as *parens patriae,* when the Supreme Court . . . . . . was instituted." In England, the Court of Chancery has always had the power of appointing guardians for infants on a proper case being made, whether such infants have property or not, see *Re Spence,*[3] *Re Flynn.*[4] Being a jurisdiction flowing from the Crown's prerogative and exercisable on the merits of each individual case, the jurisdiction transcended purely territorial limits as well as differences of race. *Prima facie* therefore the chartered High Courts in India would have the same power unless it had been cut down in any direction by specific

1. (1903) I.L.R. 25 All. 407: L.R. 30 I.A. 165 (P.C.).
2. (1913) 25 M.L.J. 661, 686.
3. 2 Phil. 247, 252.
4. 2 De G. & Sm. 457, 481.

legislation. In *In the matter of Phanindra Chandra Set.*[1] Panckridge, J., took the view that section 14 of 13 Geo. III, c. 63 had the effect of confining it beyond the limits of the High Court's ordinary original civil jurisdiction to British subjects only and that in the early statutes the term "British subject" always meant a subject of the King of British birth. To some extent colour is lent to such construction by the language of Cl. 4 of the Charter of 1800, establishing the Supreme Court at Madras distinguishing between *natives* and *British subjects.* The view of Panckridge, J., cannot be accepted for two reasons. As pointed out in *Raja of Vizianagaram* v. *Secretary of State,*[2] even assuming that prior to the passing of the Government of India Act, 1858, the jurisdiction of the Supreme Court did not extend to the native Indian minors in the mufassal such a bar cannot exist after the assumption of direct control of India by the Crown, for the moment such control was assumed every native of India became *ipso facto* a British subject and from that time onwards until its abolition, the Supreme Court could have exercised jurisdiction over native Indian minors in the mufassal and the High Court has therefore succeeded to such jurisdiction. Apart from this reason, it is clear that section 14 of 13 Geo. III, c. 63 in specifying jurisdiction does not purport to derogate from any jurisdiction that can exist in the Supreme Court outside it. It has been held in a number of cases that a chartered High Court has inherent jurisdiction to appoint a guardian to a minor and his property not merely within but also without the limits of its ordinary original civil jurisdiction though the minor is not an European British subject, *In re Shannon,*[3] *Ellen Ramm* v. *Charles Spencer,*[4] *In the matter of Govind Prasad,*[5] *In re Tarunchandra Ghosh,*[6] *Raja of Vizianagaram* v. *Secretary of State.*[2] The ruling to the contrary in *In the matter of Srish Chunder Singh,*[7] was probably due to the impression (erroneous in fact) that there were no precedents in India where such a power had been exercised; also in that case there were testamentary guardians who were sought to be displaced.

The power is however one to be exercised with the greatest caution, *Re Manilal Hurgovan.*[8] Instances of the exercise of the power are to be found in *Re Jairam Luxmon,*[9] *Re Jagannath Ramji,*[10] *Re Manilal Hurgovan*[8] *Narsi Tokersey and Co.* v. *Sachindranath Gajanan,*[11] *In re Mahadev Krishna Rupji.*[12] Where the Court has refused to exercise the power it has been on the ground of inexpediency, *In the matter of Govind Prasad.*[5]

The power has been invoked in Bombay over a long number of years to get the High Court to sanction contemplated sales or mortgages of a minor's interest by the *karta* as being beneficial to the minor so as to protect the prospective alienees.

1. (1930) I.L.R. 58 Cal. 919.
2. I.L.R. 1937 Mad. 383: 71 M.L.J. 873.
3. (1870) 2 N.W.P.H.C.R. 79.
4. (1903) 2 All.L.J. 81.
5. (1928) I.L.R. 50 All. 709.
6. (1929) I.L.R. 57 Cal. 533.
7. (1893) I.L.R. 21 Cal. 206.
8. (1900) I.L.R. 25 Bom. 353.
9. (1892) I.L.R. 16 Bom. 634.
10. (1895) I.L.R. 19 Bom. 96.
11. (1929) I.L.R. 54 Bom. 75.
12. I.L.R. 1937 Bom. 432.

Such sanction was accorded in *Re Manilal Hurgovan,*[1] *Narsi Tokersey and Co.* v. *Sachindranath Gajanan,*[2] *In re Mahadev Krishna Rupji,*[3] but was refused in *In the matter of Govind Prasad,*[4] *In re Dattatraya Govind Haldankar.*[5] In the last of these cases in refusing sanction, Kania, J., observed: "It is clear that it is the duty of a purchaser or a mortgagee to enquire and satisfy for himself that a necessity has arisen or such circumstances are there as would entitle in law the manager to enter into the proposed transaction on behalf of the joint family and which would be binding on the minor members of the family. . . . I think that it is not proper for the purchaser or a mortgagee to cast that obligation of making the inquiries on the Court and contend that unless the Court sanctions the transaction he will not enter into the same. The opportunities for testing the grounds on which the alleged necessity or benefit to the family have come into existence, are as compared with the purchaser, few to the Court. . . . . I do not think that the Court should be ordinarily called upon to make such an order on the mere *ex parte* statements of an interested party." Kania, J's., view that the alienee has no right to cast the obligation of inquiry, etc., on the Court and that the Court should not be called upon to shoulder the burden of adjudicating on the merits of each proposed alienation was dissented from in a later ruling in *In re Mahadev Krishna Rupji.*[3] In doing so, Beaumont, C.J., remarked: "He (the alienee) does not seek to cast any burden upon the Court; he merely says that he is not going on with the transaction unless he gets a good title. Now it is very difficult in many cases for a purchaser or a mortgagee to satisfy himself as to the existence of legal necessity or benefit of the estate. It is very difficult for him to check the truth of the story told to him . . . . . and not only has he to do that, but he has to preserve evidence which will be available in years to come against any attack by a minor son of the manager. . . . This burden . . . is a very heavy and often an unreasonable one. It seems to me that as the Court has jurisdiction to make an order sanctioning the transaction it ought in a proper case to do so." Rangnekar, J., added that assuming that it is a burden on the Court there was no reason why the Court should fight shy of discharging or bearing that burden.

In applying these principles, it is pointed out in the instant decision that the Court's sanction which protects the purchaser ought not to be granted on *ex parte* applications and that the minors should be made respondents and an independent guardian-*ad-litem* should be appointed to protect the interests of the minors.

LALCHAND HIRACHAND *v.* TULJARAM RAOJI, I.L.R. (1942) Bom. 67.

This case is of interest although it cannot be said to have laid down new law. It decides that the opening words of section 75 (1) of the Provincial Insolvency Act cannot be construed as

1. (1900) I.L.R. 25 Bom. 353.
2. (1929) I.L.R. 54 Bom. 75.
3. I.L.R. 1937 Bom. 432.
4. (1928) I.L.R. 50 All. 709.
5. (1932) I.L.R. 56 Bom. 519.

conferring an absolute right of appeal on the debtor, any creditor or the receiver in every case, associating the words "aggrieved by a decision" only with the words immediately preceding them in the section, namely, "any other person". A number of cases have taken the same view, *Pursingh* v. *Aladkhan*,[1] *Maung Tun Tin* v. *Chettyar Firm*,[2] *Achhru Ram* v. *Padam Parshad*.[3] There is however a ruling of the Oudh Chief Court, which seems to suggest that even where a creditor is not aggrieved by a decision he may have a right of appeal under section 75 (1), *Kanhaiya Lall* v. *Badhu*.[4] It is difficult to agree with such suggestion. The use of the words "*any other*" qualifying "*person*" seems by itself to indicate that the right of appeal is restricted to the category of persons who are "aggrieved"; otherwise, the section would have run "the debtor, any creditor, the receiver or any person aggrieved." Further the subject-matter of the appeal is adverted to only in the description following the word "aggrieved," and a contrary construction would give a right of appeal to the debtor, any creditor and the receiver without any indication of what they are to appeal against. Again that the term "aggrieved" is intended to qualify all the categories of persons referred to in sub-section (1) is borne out by the second proviso to that sub-section giving a right of second appeal to "any such person aggrieved by a decision of the District Court" which makes it absurd to assume that the right is given only to persons other than the debtor, any creditor and the receiver.

MULRAJ VIRJI *v.* NAINMAL PRATAPCHAND, I.L.R. 1942 Bom. 83.

A point of some importance fell to be decided in this case, which held that where the due date for repayment of a mortgage debt has passed it is not competent to the mortgagor to sue for an injunction to restrain the mortgagee from exercising the power of sale given to him by the mortgage deed without offering to redeem and tendering the amount due. This is also the English rule, *Hickson* v. *Darlow*,[5] *Hill* v. *Kirkwood*,[6] *Macleod* v. *Jones*.[7] The filing of a suit for redemption by itself will not be a ground for restraining the mortgagee from exercising his power, *Adams* v. *Scott*,[8] *Prichard* v. *Wilson*,[9] *Ramakrishna Mudali* v. *Official Assignee*,[10] *Jagjivan Nanabhai* v. *Shridar Balkrishna Nagarkar*,[11] *Babamiya Mohidin Shakkar* v. *Jehangir Dinshaw Belgaum Wallah*.[12] The mortgagor cannot derogate from that which he has in express terms conferred upon the mortgagee by the instrument namely, the power of sale. "To hold otherwise would simply be to tear up the instrument which contains the contract agreed upon between the parties", *Ramakrishna Mudali* v. *The*

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1. A.I.R. 1933 Nag. 9.
2. 1937 Rang.L.R. 264.
3. A.I.R. 1941 Lah 243.
4. (1937) 170 I.C. 542.
5. (1883) 23 Ch. D. 690.
6. (1880) 28 W.R. (Eng.) 358.
7. (1883) 24 Ch.D. 289.
8. (1859) 7 W.R. (Eng.) 213.
9. (1864) 10 Jur. (N.S.) 330.
10. (1922) I.L.R. 45 Mad. 774: 43 M.L.J. 566.
11. (1877) I.L.R. 2 Bom. 252.
12. I.L.R. (1941) Bom. 506.

Official Assignee,[1] see also *Muncherji Furdonji Mehta* v. *Noor Mahomedbhoy Jairajbhoy Pirbhoy.*[2] Apart from the case of offering to redeem and tendering the amount due, an injunction may be granted where the power of sale is exercised fraudulently or improperly or contrary to the terms of the mortgage, *Jagjivan Nanabhai* v. *Shridar Balkrishna Nagarkar,*[3] *Jerup Teja and Co.* v. *Peerbhoy,*[4] *Babamiya's case,*[5] or where the amount claimed by the mortgagee is obviously not due to him on the face of the mortgage deed itself, *Hickson* v. *Darlow.*[6] But an injunction will not issue merely because the amount is in dispute, *Gill* v. *Newton.*[7]

CONTRACTOR *v.* GAJRAJ SHEOKARAMDAS, I.L.R. 1942 Bom. 124.

Though the actual decision in the case that the period of limitation prescribed by Art. 183 of the Limitation Act will govern the enforcement of rights under an award on submission on being filed on the original side of the High Court under section 15 of the Indian Arbitration Act, 1899 may be accepted as correct particularly as it follows an earlier ruling of the Calcutta High Court in *Chaitram Sagormull* v. *Hardwari Mull and Co.,*[8] there being no decision to the contrary, it is difficult to agree with the dictum of Beaumont, C.J., that the expression "as if it were" in section 15 of the Arbitration Act has a wider scope than the words "in the same manner as" found in certain other enactments. According to the learned Chief Justice, while the latter expression would refer to the *method* of execution only the former would refer to both *manner as well as extent.* The view no doubt receives support from a decision of the Lahore High Court in *Pokhar Das* v. *Radhakishen,*[9] but there are a number of decisions holding that the words "as if it were" do not connote anything different from the words "in the same manner as" or "in like manner as", see *Chinnasami Mudali* v. *Thirumalai Pillai,*[10] *Ibrahim Khan Sahib* v. *Rangasami Naicken.*[11]

DATTATRAYA KASHINATH *v.* VITHALDAS BHAGWANDAS, I.L.R. 1942 Bom. 132.

Regarding the nature of the duty imposed on the Court in recording an adjustment under O. 21, r. 2 (1), Civil Procedure Code, Beaumont, C.J., has remarked in this case "that although the Court is not concerned to consider the merits of the adjustment it is concerned to consider whether the arrangement to be recorded is an adjustment, that is to say a *legal* adjustment". There is nothing in the language of r. 2 (1) to warrant the Court taking upon itself any such duty. It is the satisfaction of the decree-holder to which the rule adverts and not the satisfaction of the

1. (1922) I.L.R. 45 Mad. 774: 43 M.L.J. 566.
2. (1893) I.L.R. 17 Bom. 711.
3. (1877) I.L.R. 2 Bom. 252.
4. (1920) 23 Bom. L. R. 211.
5. I.L.R. (1941) Bom. 506.
6. (1883) 23 Ch.D. 690.
7. (1866) 14 W.R. (Eng.) 490.
8. (1927) I.L.R. 55 Cal. 499.
9. (1923) 6 Lah.L.J. 564: A.I.R. 1924 L. 544.
10. (1901) I.L.R. 25 Mad. 572.
11. (1905) I.L.R. 28 Mad. 420.

Court. On the decree-holder certifying such satisfaction the Court *shall record* the same. The rule imposes a duty on the decree-holder to certify and a duty upon the Court on such certification being given to record the same, *Shri Prakash* v. *Allahabad Bank.*[1] As pointed out in *Maung Kyaw Min* v. *Ma Hpaw,*[2] on certification by the decree-holder the Court has no alternative but to record satisfaction and "not only is it not the duty of the Court to satisfy itself before recording satisfaction that the statements in the decree-holder's petition are correct, but on the contrary the Court has no authority whatever to question those statements". A number of cases have taken the view that when the decree-holder certifies the adjustment the executing Court has no power to go into the question whether there has not been an adjustment as stated, *Mt. Champi Bai* v. *Pearey Lal,*[3] *Gamen Shah* v. *Jhangi Ram,*[4] *Lodd Govindoss* v. *Ramdoss Vishnudoss,*[5] or whether the satisfaction was intended to defraud or defeat the rights of some third party, *Kadir Meera Sahib* v. *Pir Mahomed.*[6] This view stands strengthened if regard is had to the language of r. 2 (2), where express provision is made in the case of an application by the judgment-debtor to record satisfaction or adjustment for notice to the judgment-creditor and inquiry. The difference between the two sub-sections seems to have been deliberately intended, for an application by the decree-holder to record satisfaction of the decree is *prima facie* an application against his own interest and therefore no duty is cast upon the Court to consider the propriety of the adjustment. There is no particular form either prescribed in this connection and the decree-holder may well rest content with making a bald statement that the decree has been satisfied wholly or in part. If however the materials put before the Court by the decree-holder are such *as to put the Court on notice* that there was a dispute between the parties as to whether the amount certified was less than the amount actually paid, it may be that, there is no illegality in the executing Court giving notice to the judgment-debtor and entering into an inquiry as to whether more has been paid than that which the decree-holder certifies, *Veeraraghavayya* v. *Venkata Lakshmayya.*[7]

In holding that under r. 2 (1) also the Court can examine the nature of the adjustment, the learned Chief Justice in the instant decision refers to the necessity for the Court's sanction where the guardian of a minor applies for satisfaction to be recorded which will necessitate an inquiry by the Court into the alleged adjustment. This argument overlooks the fact that the consent of the Court in such cases and the necessity for inquiry flow out of the provisions of O. 32, r. 7, Civil Procedure Code and not by reason of anything contained in O. 21, r. 2 (1).

EMPEROR *v.* SADEPPA GIREPPA, I.L.R. (1942) Bom. 115.

Section 138, Evidence Act makes it clear that in the order of proceedings witnesses shall be first examined-in-chief, then (if the

1. (1929) L.R. 56 I.A. 30: 56 M.L.J. 233: 3 Luck. 684 (P.C.).
2. A.I.R. 1931 Rang. 332.
3. A.I.R. 1938 All. 116.
4. A.I.R. 1920 Lah. 73.
5. (1912) 17 I.C. 752.
6. (1933) 64 M.L.J. 732.
7. A.I.R. 1936 Mad. 468.

adverse party so desires) cross-examined. It is obvious that there can be no real cross-examination, if there has been no examination-in-chief preceding it. It is a salutary rule that the prosecution should bring before the Court and examine all the witnesses who are alleged, or are known to have knowledge of the facts, *Queen Empress* v. *Ram Sahai Lall.*[1] What then is to be done where the prosecution does not wish to examine a witness because it has been found necessary to treat him as a hostile witness in the committal enquiry? A practice has come into vogue for the prosecution to tender such witnesses for cross-examination. No doubt the practice may not result in much mischief if the witness is a secondary witness only but in other cases it might cause hardship. The practice has therefore been justly condemned (as in the instant decision) as being inconsistent with section 138, Evidence Act, *Veerakoravan In re,*[2] *Emperor* v. *Kasamalli Mirzalli.*[3] The practice if permitted will make it difficult for the Court to determine whether the witness is credible and the so-called cross-examination by the accused will in fact be an examination-in-chief and there will be no cross-examination by the Crown because he is supposed to be a prosecution witness. At the same time the Crown cannot be compelled to call before the Court a witness who it believes is not going to speak the truth. Different courses have been suggested for adoption by different Courts in the circumstances. It has been stated in a Full Bench of the Bombay High Court that in such cases the Crown should inform the accused of the name of the witness and produce him in Court leaving it to the accused to call him or not as he thinks fit, *Emperor* v. *Kasamalli Mirzalli.*[3] A different course and a more salutary one is what has been suggested in *Guruswami Gounder, In re,*[4] namely, that it will be the duty of the Court when there is a really important witness whom the prosecution does not wish to examine because of his hostility in the committal enquiry to examine him as a Court witness and allow both sides to cross-examine him inasmuch as it is undesirable that the accused should be forced to examine him as a defence witness.

HAIDERSHA LALSHA v. DHONDU ARAJI, I.L.R. 1942 Bom. 198.

It is difficult to agree with the conclusion reached in the above case that the phraseology of section 346 (2) of the Criminal Procedure Code "to any magistrate subordinate to him having jurisdiction" is intended to mean "a subordinate magistrate other than the magistrate, who made the reference or report and competent to deal with the case as submitted." Nor is it easy to accept the statement that the magistrate to whom the report is sent under section 346 must assume the case as presented in the report submitted to him as correct for the purpose of dealing with it under sub-section (2). In effect the instant decision suggests that the magistrate to whom the report is sent cannot examine the validity of the conclusion reached by the referring magistrate as to his

1. (1884) I.L.R. 10 Cal. 1070.
2. (1929) I.L.R. 53 Mad. 69: 58 M.L.J. 145.
3. (1942) 44 Bom.L.R. 27 (F.B.).
4. (1941) 2 M.L.J. 209.

want of jurisdiction but must act mechanically and automatically on the statement. There is nothing in the language of section 346 (2) to warrant such a conclusion. Surely it cannot be that in acting under section 346 (2) the superior magistrate is discharging a purely ministerial function. An order referring the case to a particular class of Magistrate as having jurisdiction in the matter is one affecting the accused and as such has to be passed judicially, which must necessarily permit the superior magistrate to look into the materials on which the referring magistrate had concluded that he had no jurisdiction and be satisfied about the soundness of that view. No question of exercising any appellate or revisional power arises, for the referring magistrate may at any stage of the inquiry before him under section 347, as for instance, even before he has heard all the prosecution evidence, take the view that the evidence before him at that stage discloses *prima facie* an offence regarding which he has no jurisdiction and such view does not amount to an adjudication, since there is no judgment signed by him and he does not complete his dealing with the case. The referring magistrate arrives at a tentative or provisional conclusion only which may be scanned by the magistrate to whom the report is made and affirmed or otherwise treated. In this connection the provision contained in section 562, as to the submission of proceedings to a magistrate of the first class or a sub-divisional magistrate affords an instructive contrast. In such a submission the offender is actually convicted by the trying magistrate and hence when the case comes before the superior magistrate under section 380, the accused can be treated only as a convicted person and it will not be permissible for the magistrate acting under that section to interfere with the conclusion. *The Public Prosecutor* v. *Malaipati Gurappa Naidu.*[1] In a submission under sections 346 and 347, however the entire matter is at large because all the evidence need not have been heard and no judgment should have been given.

The view that the magistrate to whom the matter should be sent by the superior magistrate should not be the one who made the reference is sought to be supported on the ground that to hold otherwise would lead to an embarrassing situation if the subordinate magistrate remains unconvinced and the case might move like a see-saw unless the superior magistrate's view were regarded in law as binding on the magistrate. This reasoning is not altogether convincing. Though the superior magistrate is not in the technical sense exercising under section 346 any revisional or appellate powers still his opinion will always be treated with respect by the subordinate magistrate who will have to act in accordance with that view. The instant decision itself concedes that section 346 (2) "does not expressly prevent him from referring the case back to the reporting magistrate." The *argumentum ab inconvenienti* is more theoretical than real. As pointed out by a Full Bench of the Madras High Court in *Polur Reddi* v. *Muniswami Reddi,*[2] the sub-section is perfectly clear, definite and wide and its terms embrace a reference back of the case to the magistrate who originally submitted it.

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1. (1933) 66 M.L.J. 405.
2. (1930) I.L.R. 54 Mad. 16: 59 M.L.J. 308 (F.B.).

FIRM SARADA PROSAD DE *v.* BHUT NATH MALLIK, I.L.R. (1941) 2 Cal. 78.

This is an interesting case involving in effect a consideration of the doctrine of 'disturbance of performance' or *leistungsstorungen* as it is called in German. Subsequent to an agreement to buy a certain commodity at a fixed price, a Government Notification under rule 81 (2) (*b*) of the Defence of India Rules (the Defence of India Act being already in operation at the date of the contract) was promulgated by which a sale of the commodity at a price which was less than the contract price was alone legal. The buyer who was a retail dealer to the knowledge of the seller contended *inter alia* that the contract should be deemed to be avoided inasmuch as the Government Notification amounted to a frustration of the venture. In *Hirji Mulji* v. *Cheon Yue Steamship Co., Ltd.*[1], it was stated by Lord Sumner that in frustration "an event occurs *not contemplated* by the parties and therefore not expressly dealt with in their contract, which, when it happens frustrates their object." Goddard, J., explained the doctrine in *W. J. Tatem, Ltd.* v. *Gamboa*[2], as meaning that where a contract depends for its performance upon the continued existence of a certain state of facts, once that state of facts was destroyed the contract was frustrated (where the parties have made no provision for such an event) whether such event was or was not within the actual or deemed contemplation of the parties. The defence of frustration is thus open only where the parties have contemplated the continued existence of a certain state of facts. Again commercial impossibility or economic unprofitableness will *per se* be no excuse for failure to perform a contract, *Ezekiel Abraham* v. *Ramjusroy*[3]. In matters of business a thing is said to be impossible only when it is not practicable and a thing is impracticable when it can only be done at an excessive or unreasonable cost, *Moss* v. *Smith*[4]. Where the parties could have contemplated the contingency but did not provide for it the doctrine of frustration cannot apply, *Chandler Brothers* v. *Boswell*[5]. In the instant decision the contract was absolute. The Defence of India Act had already come into force. There was no reason to presume that the Government's power to control prices will remain a dead letter. Even after control the sale of the commodity did not become illegal. Sale at the prescribed price will no doubt result in loss. Mere loss cannot however be equated with "commercial impossibility" or "economic unprofitableness" within the meaning of the decisions. Nor is any distinction between a risk to business by Governmental control of price and a risk likely to arise through change in prices because of variations of demand and supply warranted. If it cannot be said that the risk of an interruption to traffic by weather conditions—by the formation of breaches, landslips, etc.,—could not have been foreseen and provided for in a contract relating to the collection of tolls—*see Sankaran* v. *District Board, Malabar*,[6] —much less can it be said in the instant decision that the parties contemplated the continuity of the state of affairs as it existed at the date of the contract and could not have in the circumstances of the

1. (1926) A.C. 497; *see also Sankaran* v. *District Board, Malabar*, (1934) 66 M.L.J. 108.
2. (1938) 61 C.L.R. 149.
3. (1920) 33 C.L.J. 151.
4. (1850) 9 C.B. 94, 103.
5. (1936) 3 All.E.R. 179.
6. (1934) 66 M.L.J. 108.

case foreseen a governmental control of the prices and provided for such a contingency.

HEMANTA KUMARI DEBI *v.* MIDNAPORE ZEMINDARI, CO., LTD., I.L.R. (1941) 2 CAL. 298.

It is possible to take a different view from that reached in this case which deals with the interesting question, how far lapse of possession occasioned by *vis major*, such as periodical floods, would amount to a break in the continuity of adverse possession held by a trespasser. Adverse possession is a *jus possessionis* in a person having no *jus possidendi* and to acquire title such possession must be actual, effective, visible, exclusive, hostile and continued during the time necessary to create a bar under the statute of limitation, *Jagendranath Rai* v. *Baldeo Das*[1]. Absolute security for the future is not requisite. All that is necessary is that according to the ordinary course of affairs one is able to count on the continuing enjoyment of the thing.[2] There can no doubt be no discontinuance by absence of use and enjoyment, *Leigh* v. *Jack*[3]; nor can there be continuance of adverse possession when the land is not capable of use and enjoyment so long as such adverse possession must rest on *de facto* use and occupation, *Basanta Kumar Roy* v. *Secretary of State for India*[4]. It is true that possession is not neceesarily the same thing as actual user and the nature of possession to be looked for and the evidence of its continuance must depend on the character and condition of the land in dispute and where no actual enjoyment is possible due to *vis major* the possession is deemed to continue so long as the land remains incapable of enjoyment; but no such presumption can arise in the case of a wrong-doer or trespasser, *Rakhal Chandra Ghose* v. *Durgadas Samanta*[5]. To sustain a claim to land on his part by limitation under the Indian Law there must be *actual* possession held by him or by persons deriving title from him, *Secretary of State for India* v. *Krishnamoni Gupta*[6]. There can be no continuance of adverse possession in law if the land is not capable of use and enjoyment by the rightful owner, *Sarat Chandra Maiti* v. *Bibhabati Debi*[7]. The rightful owner is not affected by anything short of actual possession held against him, *Seeti Kutti* v. *Kunhi Pathumma*[8]. Three propositions thus emerge: (1) without actual possession held no title can accrue on foot of adverse possession; (2) adverse possession cannot run against the rightful owner where the land remains incapable of enjoyment by him; and (3) the presumption as to continuance of possession during a period when actual enjoyment is not possible is not available to a trespasser. What then is the effect of submersion of land? Submergence *determines* the possession of a trespasser; the land becomes *derelict*; constructive possession is revived in the rightful owner and no adverse possession can run against him so long as the land remains in that state, *Secretary of State for India* v. *Krishnamoni Gupta*[6], *Jogendra Nath Saha Chaudhuri* v. *Maharaja Jagadindra Nath Ray*

1. (1907) I.L.R. 35 Cal. 961.
2. Dernburg cited in Salmond's Jurisprudence, 9th edn., p. 378, f.n. (*i*).
3. (1879) L.R. 5 Ex.D. 264, 274.
4. (1917) 32 M.L.J. 505=L.R. 44 I.A. 104=I.L.R. 44 C. 858 (P.C.).
5. (1922) 26 C.W.N. 724.
6. (1902) L.R. 29 I.A. 104=I.L.R. 29 Cal. 518 (P.C.).
7. (1921) 34 C.L.J. 302.
8. (1915) 33 M.L.J. 320=I.L.R. 40 Mad. 1040, 1059.

Chaudhuri[1], *Secretary of State* v. *Wazed Ali*[2], *Maharaja of Cooch Behar* v. *Raja Mahendra Ranjan*[3], *Gajadhar Prasad Sahu* v. *Dulhin Gulab Kuer*[4]. It is immaterial if previous to the submersion the rightful owner had lost possession provided his title was subsisting, *Panchanan Sarkar* v. *Rani Basanta Kumari Dasi*[5], *Khedon Lal* v. *Rajendra Narain Singh*[6]. Nor is the legal result different where the submersion is not over a period of years but is seasonal only and for a period of a few months each time, *Basanta Kumar Roy* v. *Secretary of State for India*[7], *Maharaja of Cooch Behar* v. *Raja Mahendra Ranjan*[8], *Secretary of State for India* v. *Ram.Bachan Lal*[9].

In the instant decision it was found that the land in dispute got flooded during the rainy season every year and remained under water for two or three months (p. 304). The learned Judges propounded the question whether the submersion put the disputed land out of the control of the trespasser and thus disturbed the continuity of his possession and answered it in the negative in the view that possession may be continuous even though the actual acts of enjoyment are at considerable intervals and that " the will itself may be sufficient if manifested in an appropriate environment of facts." They argued that the disputed land being capable of yielding only two crops and the occupier having raised those two crops every year in spite of the submergence during the rainy season his adverse possession was not broken. It is submitted that this is a wrong approach to the question at issue. That during the period of submersion no acts of enjoyment were had was admitted. That to bar the rightful owner, the land should continue to be capable of enjoyment by him is the law. That submergence determines a trespasser's possession, renders the property derelict and constructively vests it in the rightful owner are well settled principles. The result thus yielded by the law cannot be overridden by such features as the absence of evidence that the occupant could not use the land even if he wanted to do so, or that the very nature of the land showed that nothing active was required of the occupier to do. The presumption as to continuity of possession during the time when the land was incapable of enjoyment, as during submersion for months, not being available to a wrongdoer, it is for him to affirmatively establish a *de facto* possession, which being impossible in the circumstances of the case will negative the continuity of adverse possession against the rightful owner. This apart, the inference in law of continuity of adverse possession drawn by the Judges from the established facts of the case is also opposed to authority. In *Secretary of State for India* v. *Ram Bachan Lal*[9], on similar facts it was held by the Patna High Court that for submergence to interfere with continuous adverse possession it is enough if the submergence prevents such use and occupation of the land as the occupant would normally have but for the flooding, and that it could not be doubted that the flooding did in fact deprive the trespasser of the use and occupation of that land during the two or three months every year when it was under water and that the trespasser could not

1. (1921) 34 C.L.J. 133.
2. (1921) 34 C.L.J. 141.
3. (1921) 34 C.L.J. 465.
4. (1917) 57 I.C. 744.
5. (1925) 30 C.W.N. 497.
6. (1912) 51 I.C. 70 (Cal.).
7. (1917) 32 M.L.J. 505=L.R. 44 I.A. 104=I.L.R. 44 Cal. 858 (P.C.).
8. (1921) 34 C.L.J. 465.
9. (1940) I.L.R. 20 Pat. 497.

be said to be in *effective* possession during that time with the result that the possession of the true owner should be deemed to have revived. Likewise in *Loknath* v. *Manorath Ram*[1], where it was admitted that the land in dispute was submerged every year during the rains for three months and that at the end of the rains when the river fell and the land stood uncovered melons were grown on it and it was further found that whenever the lands so uncovered the defendants had taken possession of it and had enjoyed it in that way for more than twelve years, the Allahabad High Court held, that everytime the land was submerged the constructive possession of the true owner revived and he was not barred. Thus it is apparent as pointed out in *Trustees, Executors and Agency Co.* v. *Short*[2], the right of action in respect of the intrusion of the trespasser goes each time on submersion and limitation starts afresh every time the land stands uncovered after the period of submersion, a new cause of action coming into existence on the occupation of the uncovered land by the trespasser.

KASHI NATH PANDE *v.* EMPEROR, I.L.R. (1941) 2 CAL. 180.

An interesting point in the law of evidence came up for decision in this case which held that where a child on account of her tender years is incompetent to depose as a witness, evidence of statements made by her to other people or conduct amounting to a statement will also be inadmissible. English law rejects all transmitted or derivative evidence and all proof offered secondhand or *obstetricante manu*. Best has stated the rule to be that "no matter how unanswerably the absence of the original source is accounted for, the inferior evidence will not be received." It is clear that section 60 of the Indian Evidence Act also contemplates that derivative or secondhand proofs are not receivable *in causa*. Absence of opportunity to cross-examine the original source of information and non-existence of personal responsibility regarding the truth of the statements on the part of the person passing on the same dictate the rejection of secondhand proof. In England, where on a trial for assault with intent to ravish a very young child, evidence was given of information relative to the transaction which the child who was not examined had given to two other persons, on the question whether the reception of such evidence was legal being reserved, twelve judges unanimously held that such evidence could not be admitted. *R.* v. *Brasier*[3]. The facts in the instant decision were practically the same and the conclusion reached is in accordance with the principles of English law.

EMPEROR *v.* MAHAMMAD EBRAHIM, I.L.R. (1941) 2 CAL. 281.

This decision is noteworthy in more than one respect. It condemns the practice of sending instructions from the Government through the District Magistrate to the Public Prosecutor and having those instructions reported in the Court of the trying Magistrate who is subordinate to the District Magistrate, as one open to the gravest

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1. (1912) 11 All. L. J. 68, see also *Ram Nain Misir* v. *Deoki Misir*, (1922) 20 All.L.J. 756.

2. (1888) 13 A.C. 793.

3. (1779) 1 Leach 199 : 168 E.R. 202, see also *R.* v. *Tucker* cited in Philips and Arnold on Evidence, Vol. I, p. 10, 10th Edn.

objection. It points out that such a procedure is not contemplated by the Criminal Procedure Code, that a Magistrate trying a case has to act judicially according to law just as much as if he were a Judge in the High Court and ought not to be subjected to anything which could savour of an instruction from an outside source and that if the Government desired to put in a petition or request to the Court for an adjournment it should do so directly through the Public Prosecutor. In memorable words, it lays down the admonition that those who issue instructions otherwise, those who forward such instructions and those who obey them do not act according to law. It is a wholesome rule that the Magistrate having seisin of the case should never be placed in a position likely to cause embarrassment to him by reason of instructions issued by his superior executive officer.

Another point laid down in the case under review is that a Magistrate has no power to adjourn an inquiry or a trial *sine die.* Section 344, Criminal Procedure Code empowers a Court, if there is reasonable cause, to adjourn any inquiry or trial *for such time as it considers reasonable.* Adjourning a case *sine die* cannot be said to be an adjournment for a reasonable time and will be contrary to the provisions of section 344, *Emperor* v. *Rahmatalli*[1]. To postpone a pending case without a date being fixed is illegal, *Kewal Ram* v. *Emperor*[2]. Where the Court adjourns a case *sine die* there is a danger that the matter may be overlooked and the Court loses control of the proceedings, *Tarachand Gehimal* v. *Emperor*[3]. The policy of the criminal law being to bring persons accused of offences to justice as speedily as possible, so that if found guilty they may be punished and if found innocent they should be acquitted, an adjournment *sine die* being in effect an indefinite adjournment is contrary to such policy and is extremely harassing to the accused who should not be left in a state of tension for any length of time.

GIRIJA PRASANNA DEB GUPTA *v.* NIAZ MAHAMMAD KHAN, I.L.R. (1941) 2 CAL. 556.

This case illustrates yet another direction in which the powers of the appellate Court under Order 41, rule 33, Civil Procedure Code, may be exercised. It holds that an appellate Court can award costs of the trial Court in favour of persons who were not parties to the appeal but had been parties to the suit where such costs had been refused to them. The matter is not free from controversy. Judicial opinion is conflicting. Order 41, rule 33 is for the most part taken from Order 58, rule 4 of the Supreme Court Rules. Its object is to empower the appellate Court to do complete justice between the parties. It directs that the power may be exercised in favour of " all or any of the respondents or parties although such respondents or parties may not have filed any appeal or objections." It is obvious that the terms " respondents or parties " do not team together. They are not necessarily antithetic ; nor are they complementary. If " parties " means " parties to the appeal " the word " respondents " will be superfluous. If on the other hand it refers to parties to the

1. (1941) 45 C.W.N. 819.
2. A.I.R. 1926 All. 421.
3. A.I.R. 1932 Sind 214 ; *see also Ramchand* v. *Emperor,* A.I.R. 1929 Sind 115; *Emperor* v. *Dinalshah Rajansha,* A.I.R. 1933 Sind 358.

suit the context does not conduce to such interpretation. In *Rangan Lal* v. *Jhandu*[1], it was stated that the object of Order 41, rule 33 was manifestly to enable the Court to do complete justice between *the parties to the appeal* only and there is nothing in that rule to indicate that relief could be granted to a person who is not before the Court. The same view has been taken in *Rukia* v. *Mewa Lal*[2], though a different opinion was expressed in *Jawahar Bano* v. *Shujaat Hussain*[3] and *Madan Lal* v. *Gajendrapal*[4]. The latest ruling of the Allahabad High Court in *Partap Chand* v. *Chunni Lal*[5], seems to favour the stricter construction and holds that Order 41, rule 33 cannot be extended so as to affect one who was never impleaded in the appeal. In Calcutta, the opinion has been consistently held that a Court can under Order 41, rule 33, pass at any rate an order in *favour* of one who though not a party to the appeal was a party to the suit, in any event where the defence was a common defence, *Dasarath Pal* v. *Brojo Mohan Gaontia*[6], *Bhut Nath Deb* v. *Shasimuki Brahmani*[7], *Abinash Chandra Bidyanidhi Bhattacharya* v. *Dasrath Malo*[8], *Kamalakanta Debnath* v. *Tamijauddin*[9], *Fasal Rahman* v. *Abdul Rashid*[10]. In Madras also it has been uniformly held that the word "party" should be understood as referring to a party to the suit and hence a defendant can get the benefit of the appellate Court's powers notwithstanding an *ex parte* decree made against him, *Thirumalachariar* v. *Athimoola Karayalar*[11]—See also *Krishnaswami Naik* v. *Aiyappa Naik*[12], *Subbarayudu* v. *Papammal*[13], *Mukku Venkataramayya* v. *Mukku Chinniah*[14], *Venkatachella Pillai* v. *Ranga Pillai*[15]. The Rangoon High Court has also held that an appellate Court may vary the decree of the trial Court in favour of a party to the suit who however is not a party to the appeal, *Maung Than Gyaung* v. *Maung Than Hino*[16]. In view of the conflicting judicial pronouncements and the necessity for ensuring to the appellate Court power to do complete justice in the matter without doubt being cast on its competence to exercise the power consequent on ambiguity in the language of the rule, it is highly desirable that the Legislature should intervene and make clear that "parties" in the rule refers to "parties to the suit."

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1. (1911) I.L.R. 34 All. 32.
2. (1928) I.L.R. 51 All. 63.
3. (1920) I.L.R. 43 All. 85.
4. (1929) I.L.R. 51 All. 575.
5. 1940 A.L.J. 161.
6. (1913) 18 C.L.J. 621.
7. (1926) 45 C.L.J. 119.
8. (1928) I.L.R. 56 Cal. 598.
9. (1934) I.L.R. 61 Cal. 919.
10. (1938) 43 C.W.N. 15.
11. (1932) 65 M.L.J. 15.
12. (1914) 1 L.W. 376.
13. (1915) 29 I.C. 579.
14. (1919) 10 L.W. 357.
15. (1914) 28 M.L.J. 334.
16. A.I.R. 1939 Rang. 213.

SUBHKARAN SINGH *v.* KEDAR NATH TEWARI, I.L.R. (1941) ALL. 612.

Whether the Court has power to exclude the testimony of a witness who had been present in Court during the examination of other witnesses in defiance of the Court's order "putting or placing the witnesses under the rule" is a debatable matter. A rescript of Hadrian states that the Judge ought to listen to every admissible kind of evidence and form the best conclusion he could.[1] It is not generally competent to the Court to refuse to examine any of the witnesses produced by the parties, unless the object of summoning a large number of witnesses clearly appears to be to impede the adjudication of the case or otherwise to obstruct the ends of justice.[2] Where collusion among witnesses is apprehended or there is reason to believe that any of them will be influenced, or when required in the interests of justice, the Court may order all the witnesses excepting the one under examination to withdraw, either on application of either party or *proprio motu*, see *Southey* v. *Nash.*[3] In England, the power of ordering out of the Court is discretionary with the Judge and is not a matter of right so far as the parties are concerned, *R.* v. *Murphy.*[4] Even where the Court passes such an order it will not be competent to the Judge to shut out the testimony of a witness who has disobeyed the order.[5] The decisions fully support this view. In *Chandler* v. *Horne,*[6] during the trial of an action for slander, the witnesses were all ordered out of Court but one of the witnesses called for the plaintiff admitted that he had been in Court during the whole case. On the question whether his testimony should be rejected, Erskine, J., observed: "It used to be formerly supposed that it was in the discretion of the Judge, whether the witness should be examined. *It is now settled and acted upon by all the Judges that the Judge has no right to exclude the witness: he may commit him for contempt, but he must be examined*; and it is then a matter of remark on the value of his testimony that he has wilfully disobeyed the order." Similarly in *Cobbet* v. *Hudson*[7], Lord Campbell, C.J., remarked: "We must be careful that we do not abridge the right conferred on suitors by common or statute law, while we are acting merely on views of policy and expediency with respect to which different Judges may form different opinions.... With respect to ordering the witnesses out of Court, although this is clearly within the power of the Judge and he may fine a witness for disobeying his order, the better opinion seems to have been that *his power is limited to the infliction of the fine* and that *he cannot lawfully refuse to permit the examination of the witness*," see also *Cook* v. *Nethercote,*[8] *Thomas* v. *David,*[9] *Rex* v. *Colley.*[10] Such are the principles of English Law on this matter. In India neither the Evidence Act nor the Codes of Civil or Criminal Procedure contain any rule for ordering witnesses out of Court although the rule is substantially followed as a matter of practice. Section 135 of the Evidence Act merely provides that the order in which witnesses are produced and examined shall be regulated by the law and practice

1. Dig. 22, 5, 3, 2.
2. Woodroffe and Ameer Ali, The Indian Evidence Act, 9th edn., p. 969.
3. (1837) 7 C. and P. 632.
4. (1837) 8 C. and P. 297 at 307.
5. Taylor on Evidence, section 1401.
6. (1842) 2 Moody and Robinson 423 : 62 R.R. 819.
7. (1852) 1 El. and Bl. 11 : 93 R.R. 1.
8. (1835) 6 C. and P. 741 : 40 R.R. 855.
9. (1836) 7 C. and P. 350 : 48 R.R. 794.
10. (1829) 1 Moo. and Mal. 329.

for the time being and in the absence of such law by the discretion of the Court. There is no suggestion that if a witness had stayed in Court during the examination of other witnesses in spite of the Court's order, his testimony can be shut out; nor is there any sound reason to warrant a departure from the English practice. In *Lalmani* v. *Bijai Ram*,[1] Bennet, J., stated: "The universal practice in the Courts in India is . . . that no witness who is to give evidence should be present when the deposition of a previous witness is being taken and a breach of the rule is an abuse of the process of Court and therefore under section 151 of the Civil Procedure Code the Court has inherent power to prevent that abuse and direct that such a witness should not be examined." Stated as a rule, the principle is open to criticism. A witness may not be a material witness or his testimony may bear on an issue to which the testimony of the other witnesses may not have been directed. To refuse permission to examine such a witness because he has disobeyed the order of Court will be without point. Also, ordering out of Court is not made usually where a witness is also a party or in the case of experts while the particular class of evidence starts. The practice as to ordering out of Court is thus admittedly not absolute. That every party to a suit is entitled to have all the witnesses whom he desires to call and is ready at the trial to produce, heard by the Court whatever opinion the Court may form by anticipation as to the probable value of the evidence when it shall be given is well settled, see *Lodloo Singh* v. *Rajendur Laha*,[2] *Shaik Ibhram* v. *Shaik Suleman*.[3] Defiance of the Court's order to stay away can be suitably punished; it can hardly however be a reason why the party should suffer. The view in the instant decision following the English practice is more in harmony with the principles of natural justice than the opinion rendered in *Lalmani* v. *Bijai Ram*.[1]

SHANTI SARUP DAS *v.* ASHARFI SINGH, I.L.R. (1941) ALL. 250 (F.B.).

A simple point, albeit one likely to arise under the Tenancy Acts in the different provinces was the subject of decision in this case which held that the erection of a masonry dwelling house covering one half of an agricultural holding for the benefit of a Panchayati Akhara will not be a work of "improvement" within the meaning of the Agra Tenancy Act, 1926. The test of an improvement seems more or less to be the same under the different Tenancy Acts. Section 3 (11) of the Agra Tenancy Act defines an "improvement" as any work which materially adds to the value of the holding, which is suitable to the holding and is consistent with the purpose for which it was let. Section 3 (4) of the Madras Estates Land Act has virtually the same definition as also section 76 (1) of the Bengal Tenancy Act. Section 3 (3) of the Malabar Compensation for Tenants' Improvements Act, 1900, has also enacted a similar definition. Thus suitability to the holding and consistency with the purpose thereof would form the tests to be applied. The conclusion to be reached on such application will essentially be one of fact only. The Bengal Tenancy Act and the Madras Estates Land Act mention specifically among instances of "improvements" the erection of dwelling houses for the ryot and his family and servants. Section 4 of the Malabar Compensation for

1. 1934 A.L.J. 750. 2. (1867) 8 W.R. 364.
3. (1884) I.L.R. 9 Bom. 146.

Tenants' Improvements Act declares the "erection of dwelling houses, buildings appurtenant thereto and farm houses" to be works of improvement. Under the Agra Tenancy Act the erection of buildings required for the convenient or profitable use or occupation of the holding is spoken of generally as being an improvement; there is however no advertence in that Act specifically to the erection of buildings to serve as dwellings. Notwithstanding these slightly different enunciations there cannot be much doubt that the erection of a house or other building, *pucca* or *kacha* on the holding will *prima facie* be a work of improvement if it is suitable to the holding and consistent with its purpose, that is to say, if it does not constitute a diversion of the land to an alien purpose. The use for which the building is erected will thus be a relevant factor. The erection of a mantap, for instance, on the holding to serve as a place of worship not for the ryot and his family merely but for the neighbours also will not be justifiable, *Akshay Kumar Shaha* v. *Kamini Kumar Shaha*[1], nor the putting up of a pucca structure to store grain grown elsewhere and to use it as a shop for making profit, *Narayana Gajapati Raju* v. *Jaggayya.*[2] It is equally obvious that the area withdrawn for the erection of the structure will also be a material factor, *Narayana Rao* v. *Zemindar of Muktyala.*[3] The conversion of one forty-eighth of a holding into a building site and raising two pillars to support a structure will be within the scope of the tenant's powers to effect improvements, *Raman Chetty* v. *Arunachalam Chettiar,*[4] *Sankaralinga Moopanar* v. *Subramania Pillai.*[5] Likewise the use of less than one-twentieth of the holding for constructing a building and for housing cattle will be unobjectionable, *Zemindar of Seithur* v. *Dorai Venkataraju.*[6] In *Narayana Gajapati Raju* v. *Jaggayya,*[2] it was held that the erection of a compound wall to prevent the convenient enjoyment of the holding by preventing the trespass of cattle into the field and the putting up of the building on about one fifteenth of the holding for the purpose of storing crops raised on the holding will be "improvements." As pointed out in *Hari Mohan Misser* v. *Surendra Narayan Singh,*[7] the question will really depend on the size of the holding, the area withdrawn from agricultural purposes and the effect of such withdrawal upon the fitness of the holding taken as a whole for profitable cultivation. Where the building does not add to the value of the holding and is unsuitable to it, it certainly cannot constitute an improvement at all, *see Mammad* v. *Veerarayan.*[8] In the instant case about half the area of the holding was divested from agricultural purposes and the building erected was not designed for the use of the ryot or for any purpose associated with the tenancy and on those facts the conclusion was inescapable that the building concerned was not a work of improvement.

EMPEROR *v.* NASIR KHAN, I.L.R. (1941) ALL. 465.

The acceptability of the view taken in this decision, namely, that on the application of the complainant the sentence imposed by the lower Court can be enhanced, will turn on what is to be deemed as the proper objective in punishment for crime, whether it is to be awarded

1. (1934) I.L.R. 62 Cal. 488. 2. (1941) 1 M.L.J. 523.
3. (1928) 54 M.L.J. 621 : I.L.R. 51 Mad. 478.
4. (1914) 29 M.L.J. 724 : I.L.R. 39 Mad. 673.
5. (1915) 29 M.L.J. 514. 6. (1939) 1 M.L.J. 433.
7. (1907) 17 M.L.J. 361 : L.R. 34 I.A. 133 : I.L.R. 34 Cal. 718 (P.C.).
8. 1929 M.W.N. 165.

on the footing that crime is an anti-social act or by way of satisfying the feelings and sentiments of the injured party as well. The view-point in regard to this matter has been gradually shifting and punishment is now seldom regarded as a retribution for the injury inflicted. Judicial opinion on the matter is also divided. At one end it has been held that it is the part of the Crown and not of individuals to ask Courts to enhance sentences passed upon criminal offenders, *Jadunandan Brahman* v. *Emperor*,[1] *Hanuman Prasad* v. *Mathura Prasad*[2]. The reason is that it is essential that the Courts should not be allowed to become tools in the hands of members of the public in giving vent to their private animosities and where those responsible for the maintenance of peace and order in the locality do not feel any dissatisfaction with the sentence awarded there is little reason for any interference by the Courts, *King-Emperor* v. *Som Nath.*[3] In this view it has been held by the Bombay High Court in *Naggi Dula,* In re,[4] that according to any view of the powers of the High Court under the Criminal Procedure Code no private party is entitled to apply to the High Court to enhance a sentence passed by a subordinate Court and that the complainant can only draw the attention of the Government to the sentence leaving it to them whether the matter should be brought up before the higher Court or not. At the other end, it has been held that in proper cases the High Court will on the application of a private person enhance the sentence passed on the accused and it is immaterial through what agency the matter is brought before the Court, whether by the Crown, or by the complainant or *suo motu*, *M. T. Das* v. *E. D. Aboo.*[5] In justification of this conclusion it has been stated that it is not intended by the Criminal Procedure Code that the only remedy of a complainant should be to apply to a District Magistrate to move the Government to apply for an enhancement because the local Government will only apply if the enhancement is desirable in the public interest and not otherwise; whereas the High Court does not regard the question only from the point of view of the public interest but from the circumstances of the particular case before it, *Man Singh* v. *Reoti.*[6] A slightly different position stands revealed in the decisions of the other High Courts. It has been held that though it is not the policy of the High Court to enhance sentences in criminal cases on a petition by a party it is not an invariable rule, *Ata Mohammad* v. *Khanum,*[7] *Bhagolelal* v. *Crown,*[8] *Shankar* v. *Rama.*[9] It is pointed out by the Calcutta High Court that the fact that gratification of private spite should be discouraged is no doubt the reason why that High Court has consistently refused to entertain applications for enhancement at the instance of a private party but that at the same time there is no absolute rule and in a case where there is manifestly a ground for interference beyond all reasonable doubt it matters not if the case comes before the Court at the instance of a private party, *Ali Akabbar* v. *Kasem Ali,*[10] *Pramatha Nath Basu* v. *Ganga Charan Chakravarti.*[11] This line of reasoning is certainly weak, for if the case is so very clear there is no reason to apprehend that the Government will be acting perversely and not

1. (1927) I.L.R. 2 Luck. 805.
2. A.I.R. 1933 Oudh 421.
3. (1938) I.L.R. 14 Luck. 401.
4. (1924) I.L.R. 48 Bom. 358.
5. (1930) I.L.R. 8 Rang. 578.
6. (1930) I.L.R. 53 All. 223.
7. A.I.R. 1938 Lah. 116.
8. I.L.R. (1942) Nag. 208.
9. I.L.R. (1942) Nag. 277.
10. (1929) 33 C.W.N. 605.
11. (1929) I.L.R. 56 Cal. 964.

move in the matter, particularly where its attention has been invited by the complainant to the gross inadequacy of the sentence.

IN THE MATTER OF AN ADVOCATE, I.L.R. (1941) ALL. 592.

In holding that a complaint to the High Court under section 10 (2) of the Indian Bar Councils Act, 1926, alleging acts of criminal misappropriation by an advocate of his client's money should not in the first instance be considered by the Court in the exercise of its disciplinary jurisdiction, that the Court *should summarily reject the complaint* leaving the complainant to prosecute the advocate in a Criminal Court and that only after the guilt of the advocate has been so established a complaint can be made to the High Court for taking action under section 10 (2), it is submitted with respect that the Allahabad High Court has imparted rigour and rigidity into the principle laid down by the Privy Council in *Har Prasad Singh* v. *Judges of the High Court at Allahabad*[1] as to the proper procedure to be adopted in such cases; for which rigidity there seems to be scanty warrant either in the language of the statutory provisions concerned or in the decisions. For instance clause 10 of the Letters Patent (of the Madras High Court) which is the basis for the disciplinary jurisdiction exercised by that High Court empowers it to remove or suspend from practice an advocate on "reasonable cause." The Legal Practitioners' Act, 1879, contains a similar provision in section 13. Section 10 (2) of the Bar Councils Act enacts that upon receipt of a complaint made to it, the High Court, if it does not summarily reject the complaint, may refer the case for inquiry and deal with it on the report submitted. This provision has been construed as meaning that the Court would not be justified generally in dismissing a petition summarily unless it was satisfied that even if the allegations made in the petition be proved there would be no case for taking action, *Ramkrishna Bai* v. *Davar.*[2] There is no countenance anywhere to the view that a summary rejection of the complaint can or ought to be made where the acts alleged against the advocate amount to a charge of an offence committed by him. In *Har Prasad Singh* v. *Judges of the High Court at Allahabad*,[1] the High Court had made an order under clause 8 of the Latters Patent (Allahabad) removing the practitioner from the roll of vakils on charges of misconduct including perjury in connection with a civil suit. In seeking special leave to appeal to the Privy Council, one of the grounds urged was that a criminal prosecution ought to have preceded the inquiry under the disciplinary jurisdiction of the High Court. Adverting to this argument, Lord Macmillan stated: "Their Lordships think it right to add that while they do not take the view that it is incompetent for the High Court to deal under clause 8 of the Letters Patent with charges of a criminal nature against a practitioner unless and until these have been investigated by a Criminal Court they regard it as eminently fitting that in such cases the criminal prosecution should precede any disciplinary action." So stated the rule is elastic. A particular course of action is declared desirable. Non-pursuit of it in the first place is not however to render incompetent the exercise of disciplinary jurisdiction. A summary rejection of the complaint is not compelled. In Calcutta, it has been observed that the *correct procedure* to be followed

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1. (1931) 61 M.L.J. 130 : L.R. 58 I.A. 152 : I.L.R. 53 All. 183 (P.C.).
2. (1932) 34 Bom.L.R. 443.

in cases where what is alleged against the practitioner amounts to a charge of the commission of an offence by him, will be to prosecute him criminally, *Rajendra Kumar Datta*, In the matter of,[1] *Emperor* v. *Satish Chandra Singha*,[2] but that it is by no means an *inflexible rule*, In re *Chandi Charan Mitter, a Pleader*.[3] A trial under the disciplinary jurisdiction of the High Court is summary; trial for a criminal offence will be with a jury and under the normal procedure. In the former case no appeal lies; in the latter case the benefit of a right of appeal exists. If action is taken under the disciplinary jurisdiction the accused can however give evidence in his own behalf; if he is criminally prosecuted he cannot do so. This last advantage available in a summary inquiry is more than off-set by the disadvantages otherwise involved in such a course. Be it as it may, is there adequate justification for summarily rejecting the complaint merely because the complainant has not chosen to prosecute the advocate concerned? It may be that the complainant is not anxious to prosecute but at the same time honestly feels that the practitioner concerned should no longer in the interests of the public practise as an advocate. Nor can it be that failure to prosecute the advocate has the effect of effacing his delinquencies and making him fit to continue in practice. Such being the case, why should the complainant " in all circumstances " be in effect compelled to prosecute by his complaint being summarily thrown out? As observed by Reilly, J., in In re *an Advocate*[4]: " Misconduct which is the subject of inquiry under the Bar Councils Act may often involve the commission of criminal offences. The criminal offence involved may sometimes be of a petty nature, such as trespass or assault, or may be only incidental to the misconduct which is the serious matter alleged against the advocate concerned. In such cases it may often be quite unnecessary to insist that the criminal charge should be disposed of before the advocate's conduct is investigated under the Bar Councils Act. Again the criminal offence alleged against the advocate may be such that he can be prosecuted for it only on the complaint of a private person which has not been made or may be one in respect of which it is obviously appropriate that the complaint should be made by a private person and no such complaint has been made. In either of these cases there may be nothing improper or inappropriate in launching an inquiry into misconduct under the Bar Councils Act, although the criminal charge involved has not been disposed of. But when the advocate is accused of a grave criminal offence for which no private complaint is required, to deal with him under the Bar Councils Act for the misconduct involved in the commission of that offence before he has been tried for the offence appears to be altogether improper." It may be stated with respect that the rule thus laid is more in consonance with the observations of the Privy Council in *Har Prasad's case*[5] than the one to be found in the instant decision.

EMPEROR v. MEHDI ALI, I.L.R. (1941) ALL. 608.

A notable pronouncement on the question of imprisonment awardable in default of fine is to be found in this case. There are

1. (1926) 30 C.W.N. 186.
2. (1927) I.L.R. 54 Cal. 721.
3. (1920) I.L.R. 47 Cal. 1115.
4. (1931) 61 M.L.J. 148 : I.L.R. 54 Mad. 857 (F.B.).
5. (1931) 61 M.L.J. 130 : L.R. 58 I.A. 152 : I.L.R. 53 All. 183 (P.C.).

two statutory limitations as to the term of imprisonment to be awarded in default of fine. Section 65 of the Penal Code has laid down that the term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine. Section 33 (1) (*b*) of the Criminal Procedure Code states that the period shall not exceed one-fourth of the period of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of the payment of the fine. A further limitation is suggested in the decision under notice. It states that it is undesirable to add to a very long term of substantive imprisonment a fine which there is no prospect of the accused by reason of his poverty paying and for default in the paying of which he will have to undergo a further term of imprisonment, particularly where the latter term will bring the sentence of imprisonment to more than the maximum term prescribed for the offence of which he is convicted. To sentence a person to pay a fine where it is clear that he has not got the means of paying is unmeaning. To direct that he should suffer a term of imprisonment in default achieves no real purpose. If the order is enforced it will savour of vindictiveness; if it is to remain unenforced it will be a *brutem fulmen.* Hence the precept that no fine at all should be awarded in such cases. Where the maximum term of imprisonment prescribed for an offence is not awarded it is only because in the opinion of the Court such a sentence is not called for. If therefore the imprisonment awarded in default of fine when tacked to the substantive punishment, in a case where it is clear that the offender is not in a position to pay the fine, exceeds the maximum imprisonment prescribed for the offence, it will in reality be to belie the reason underlying the award of a lesser term as substantive imprisonment and enable the Court to do indirectly the very thing which it does not deem it desirable to do directly.

DISTRICT BOARD, DEHRA DUN *v.* BABU RAM, I.L.R. (1941) ALL. 276.

This case deals with a question of limitation and holds that a suit by a District Board for realising a certain amount as tax on circumstances and property is not really a suit for recovery of money but for the recovery of a liability under a statute which "obviously" does not fall within articles 37 to 115 of the Limitation Act prescribing three years' limitation but would be governed by article 120. There are no doubt a number of decisions taking the same view. In *President of the Municipal Commission, Guntur* v. *Srikakulapu Padmarazu*,[1] a suit for recovery of profession tax by a municipality under the provisions of the Madras Towns Improvements Act (III of 1871) was held be to governed by article 120. The same period of limitation was held to apply to a suit for the recovery of house and latrine taxes, *Dip Narain* v. *Additional District Magistrate*;[2] to a suit for realising the license fee payable in respect of a platform erected by the defendant, *Mathura Prasad* v. *Special Officer, Gaya Municipality*;[3] to suits for recovery of assessment or revenue, *Antaji Vasudev* v. *Kashinath Dhondo*,[4] *Kasturi Gopala Aiyangar* v. *Anantaram*:[5] to suits by a landholder under the

1. (1881) I.L.R. 3 Mad. 124.
2. A.I.R. 1933 Pat. 65.
3. A.I.R. 1938 Pat. 192.
4. (1904) 6 Bom.L.R. 423.
5. (1902) 13 M.L.J. 248 : I.L.R. 26 Mad. 730.

Madras Local Boards Act against an intermediate landholder for recovery of cess paid, *Kuppuswami Aiyar* v. *Raja Rajeswara Sethupathi,*[1] *Raja of Vizianagaram* v. *Thammanna*[2]and to suits by a former proprietor of an estate for the surplus of sale proceeds which the Collector was bound to pay under section 31 of the Revenue Sales Law Act (XI of 1859), *Secretary of State* v. *Guru Proshad Dur,*[3]. *Bijoy Lal* v.*Nayan Munjari Dassi*[4]. If however the instant decision is to be deemed as according unqualified approval—which it seems to do—to the proposition that wherever a liability is statutory, in the absence of any specific prescription in the statute itself covering the case; it is article 120 of the Limitation Act that must govern a suit for the enforcement of the liability, it is submitted, with respect, that the position is open to criticism. The decision under notice quotes with approval the observation in *Raja of Vizianagaram* v. *Thammanna,*[2] at page 503: " We see no warrant for applying the three years' rule. The suit is not one for rent, nor is it based on any contract express or implied. It is to enforce a statutory liability created by statute." The Full Bench had added " In such a case the course of decisions in this Presidency has been to the effect that the suit will be governed by article 120." Two remarks fall to be made. In the first place most of the decisions applying article 120 to cases of taxes and assessments sought to be recovered have merely so assumed, or proceeded on the footing that in the particular cases there has been no other article of the Limitation Act governing the facts of such a case and not on the ground that because the liability is statutory the case cannot be fitted into the other articles, whatever the facts of the particular case may be, even if that can be compassed without any perceptible jolt. Secondly, even in Madras, it has been pointed out that the application of article 120 indiscriminately to every case of enforcement of a statutory liability will not be justified. Thus in *Muthuramalinga Sethupathi* v. *Mahalinga Raju,*[5] Seshagiri Aiyar, J., observed : " I am unable to see why a statutory liability should not bring a claim under the specific articles if otherwise the words are capable of covering it." This view seems to be inferentially approved in later decisions in Bombay and Patna. In *Abasbhai* v. *Bhimji,*[6] in regard to a suit by a tenant for recovery back of a premium which by section 8 (2) of the Bombay Rent Act had been declared to be a liability repayable and as such would be a statutory liability, it was held that article 62 and not 120 that would apply. Beaumont, C.J., remarked : " It is no doubt true that a statute gave the defendant the right to recover the money, but it seems to me that once money is paid over by the defendant to the plaintiff in such circumstances that it is immediately repayable it matters not whether the right to repayment arises under some statute or because of some rule of law or of equity . . . . If a case falls clearly within the words of article 62 effect must be given to such article." On the same footing, in *Ramparikha Pandey* v. *Mt. Ranjhari Kuer*[7], a claim to enforce a statutory obligation under section 55 of the Transfer of Property Act was held to be governed by article 111 of the Limitation Act. It would thus seem that the scope of the decision under notice should be understood as not transcending its special facts.

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1. (1925) 49 M.L.J. 462. 2. (1937) 1 M.L.J. 91 : I.L.R. (1937) Mad. 498 (F.B.).
3. (1892) I.L.R. 20 Cal. 51 at 57 (F.B.). 4. (1919) I.L.R. 47 Cal. 331.
5. (1917) 33 M.L.J. 379. 6. (1931) 33 Bom.L.R. 1563.
7. (1936) I.L.R. 15 Pat. 753.

JNAN CHANDRA MUKHERJI *v.* MANO RANJAN MITRA, I.L.R. (1941) 2 Cal. 576.

This case deals with a point on which there is a divergence of judicial opinion. It holds that a payment of interest as such by a principal will not save limitation against the surety. This view of the law does not seem to be sound. Principals and sureties are according to all decisions not to be regarded as joint contractors and are as such outside section 21 of the Limitation Act. The surety's liability is co-extensive with that of the principal debtor unless otherwise provided in the contract (section 128, Contract Act). 'Co-extensive' means in the same degree in all directions and *prima facie* covers both *quantum* as well as *time*. The contract itself is in terms to discharge the liability of the principal (section 126, Contract Act). No doubt the principal's liability arises on the loan while that of the surety on his default only, but the debt is the same and identical as regards both of them. There cannot be two distinct debts; otherwise payments on account of principal or interest by the principal debtor would not *ipso facto* reduce the debt due by the surety and *vice versa* as they do. It is true that the surety's liability does not necessarily in all cases spring into existence simultaneously with that of the principal, but that will not mean that his liability despite originating in the same transaction is distinct in the sense that the debts of the principal and the surety are distinct for purposes of the application of section 20 of the Limitation Act, and the opinion to that effect underlying *Brajendra Kishore Roy Chowdhury* v. *The Hindusthan Co-operative Insurance Society, Ltd.*[1], *Charu Chandra Bandopadhaya* v. *Faithful*[2], *Gopal Daji* v. *Gopal Bin Sonu*[3], *Raghavendra Gururao* v. *Mahipat Krishna*[4], *Srinivasa Varadachariar* v. *Echammal*[5], *Govindaraja Mudali* v. *Samarapuri Chettiar*[6], *Vaiyapuri Pandaram* v. *Seetharama Chettiar*[7], *Seth Abde Ali* v. *Askaran*[8], *U Ba Pe* v. *Ma Lay*[9], *Dialu Mal* v. *Nandu Shah-Jai Lal*[10] seems to be erroneous. The proper view would appear to be that in cases of principal and surety there are two contracts in respect however of *one debt* common to both, see *Ranjit Ray* v. *Kisori Mohan Gupta*[11]. Section 20 of the Limitation Act provides that where interest on a debt is before the expiration of the prescribed period paid as such by the person liable to pay the debt or by his agent duly authorised in this behalf . . . a fresh period of limitation shall be computed from the time when the payment was made. Computed as regards what? Obviously it can only be in regard to the *common debt* of the principal and the surety. There is nothing in the section restricting the benefit accruing to the creditor with respect to the amount due to him to his remedy against the person paying alone; the debt being kept alive the result must be to make it enforceable against any one liable for it, *Domi Lal Sahu* v. *Roshan Dobay*[12], *Velayudham Pillai* v. *Vaithialingam Pillai*[13], *Harbans Lal* v. *Nathu*[14], *Ranjit Ray* v. *Kisori Mohan Gupta*[11]. There is considerable force in the observation of Fry, L.J., in In re *Frisby: Allison* v. *Frisby*[15], that as it is

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1. (1917) I.L.R. 44 Cal. 978.
2. (1919) 53 I.C. 999 (Cal.).
3. (1903) I.L.R. 28 Bom. 248.
4. (1924) I.L.R. 49 Bom. 202, 206.
5. (1910) 21 M.L.J. 455.
6. A.I.R. 1930 Mad. 112 (2).
7. (1933) 40 L.W. 479.
8. A.I.R. 1924 Nag. 411.
9. (1932) I.L.R. 10 Rang. 398.
10. (1931) I.L.R. 13 Lah. 240, 248.
11. I.L.R. (1940) 2 Cal. 362.
12. (1906) I.L.R. 33 Cal. 1278.
13. (1912) 24 M.L.J. 66.
14. (1913) 53 I.C. 586 (Lah.).
15. (1889) 43 Ch.D. 106, 108.

the practice for the principal debtor and not the surety to pay the interest "it would be contrary to good sense and common understanding of mankind that while he is doing so the statute should run in favour of the surety unless he makes a payment or gives an acknowledgment." Also in the scheme of the Limitation Act, whenever the Legislature intended that a fresh period of limitation is to operate against certain persons only, it has said so in distinct terms—*see* section 18. There is nothing in the language of section 20 to indicate that the extension is only to operate against the person making the payment, *Domi Lal Sahu* v. *Roshan Dobay*[1]. It is indeed difficult to see why on principle a payment by one of several persons liable under the same transaction should not operate to extend limitation against them all in the case of a principal and surety inasmuch as section 21 does not expressly exclude such a case. For these reasons the view taken in *Ranjit Ray* v. *Kisori Mohan Gupta*[2] seems to be preferable to the one adopted in the instant decision.

EMPEROR *v.* GHURA, I.L.R. (1941) All. 912.

"Oh, the little more, and how much it is!

And the little less, and what worlds away."

So said Robert Browning whose words were quoted by Darling, J., in *Rex* v. *Marks Feigenbaum*[3] in pointing out the momentous and altogether contrary conclusions likely to be suggested by the silence of an accused after being informed about the statements made by others implicating him in the commission of an offence according as it is taken as supplying or not just that amount of corroboration that may be needed. According to the English Law no presumption arises *ipso facto* from the silence of an accused but non-denial cannot always be ignored. Silence when charged by the police after being cautioned that he need not say anything in answer to the charge unless he wished to do so will not amount to corroboration, *Rex* v. *Job Whitehead*[4]. That however stands on a special footing, see *Rex* v. *Tate*[5]. According to the report of the judgment in the case as found in the Law Times, Lord Alverstone, C J., seems to have observed: "The non-denial of the offence by the prisoner when formally charged by the police is not corroboration." The judgment of the learned Chief Justice as set out in the official reports that "it may be that in some cases the absence of an indignant repudiation of a charge might be some corroboration" has therefore to be understood as covering cases of the accused's silence when questioned by persons other than the police or without the administering of the warning that he need not say anything unless he wished to do so and that if he said anything it might be used in evidence against him. The view expressed by Darling, J., in *Rex* v. *Marks Feigenbaum*[3], that "the failure of the appellant to make any reply to the statement of the police officer might, having regard to the nature of the statement and to the circumstances in which it was made, be considered as a corroboration" of the other

1. (1906) I.L.R. 33 Cal. 1278.
2. I L.R. (1940) 2 Cal. 362.
3. (1919) 1 K.B. 431.
4. (1929) 1 K.B. 99.
5. (1908) 2 K.B. 680: 99 L.T. 620.

evidence does not seem to have noticed the qualification in the judgment of Lord Alverstone, C.J., in *Rex* v. *Tate*[1] as reported in the Law Times and in any event stands opposed by the opinion expressed by Lord Hewart, C.J., in the later ruling in *Rex* v. *Job Whitehead*[2]. The latest English ruling on the point *R.* v. *Keeling*[3] follows this last decision and holds that silence cannot amount to corroboration. It is thus clear that *R.* v. *Feigenbaum*[4] is out of line with later decisions. No doubt it has not been stated anywhere definitely that *Feigenbaum's case*[4] is no longer of any authority but it is apparent that *Whitehead's case*[2] is treated as laying down the better view of the law on the matter, see *R.* v. *Charavanamuthu*[5], *R.* v. *Naylor*[6]. In any event as stated by Lord Roche in *Stephen Seniviratne* v. *The King*[7] to arrive at an adverse verdict on the strength of opinions formed as to the conduct of the accused is . . . to act upon the merest scintilla of evidence and to be impermissible." According to Tindal, C.J., "The proof of the case against a prisoner must depend for its support not upon the absence or want of any explanation on the part of the prisoner himself but upon the positive affirmative evidence of his guilt that is given by the Crown. It is not, however, an unreasonable thing and it daily occurs in investigations . . . . that if there is a certain appearance made out against a party, if he is involved by the evidence in a state of considerable suspicion, he is called upon for his own sake and his own safety to state and to bring forward the circumstances whatever they may be, which might reconcile such suspicious appearances with perfect innocence," *Regina* v. *Frost.*[8] Thus according to the English decisions, *firstly*, silence when charged by the police cannot give rise to any adverse inference against the accused; *secondly*, to draw an adverse verdict on the strength of opinions formed as to the conduct of the accused is impermissible; *lastly*, where the evidence in the case involves the accused in "a state of considerable suspicion" it will be in his own interest to mention the circumstances which might reconcile the suspicious appearances with his innocence. In India, section 106 of the Evidence Act lays down that when any fact is specially within the knowledge of any person the burden of proving that fact is upon him and illustration (*h*) to section 114 provides that when a person refuses to answer a question which he is not compelled to answer by law it may be presumed that the answer, if given, would be unfavourable to him. These rules cannot however be read as casting any burden on an accused person to show that no crime was committed by proving facts specially within his knowledge nor will they warrant the conclusion that if anything is unexplained which the Court feels the accused could explain he should be found guilty, *King-Emperor* v. *Damapala*[9]. It is one thing to say that the rules cannot cast any burden on the accused,

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1. (1908) 2 K.B. 680: 99 L.T. 620.
2. (1929) 1 K.B. 99.
3. (1942) 1 All. E.R. 507.
4. (1919) 1 K.B. 431.
5. (1930) 22 Cr. App. Rep. 1.
6. (1933) 1 K.B. 685.
7. (1936) 41 C.W.N. 65 (P.C.).
8. (1839) 4 St. Tr. N.S. 85, 443.
9. (1936) I.L.R. 14 Rang. 666 (F.B.).

nor suggest any inference as to his guilt as flowing out of his silence *per se*, but it will be a different thing to claim that silence can never be taken into account against the accused. Section 342, Criminal Procedure Code, states in terms that for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may at any stage of any inquiry or trial without previously warning the accused put such questions to him as it considers necessary and that the Court may draw such inference as it thinks just from his refusal to answer such questions. It may be that in some cases the Court may draw even an inference against the accused from his refusal to answer—a risk which the accused has to face if he remains immured in silence, see *Emperor* v, *Dwijendra Chandra Mukerjee*[1], *Amrita Lal Hazra* v. *Emperor*[2], *Sher Jang* v. *Emperor*[3], *Tahsizuddin Ahmad* v. *Emperor*[4]. No hard and fast rule can be laid down but care must be taken in all cases not to put too high an adverse value on such silence, *King-Emperor* v. *Damapala*[5]. The Indian Law must in view of the statutory provisions referred to *supra* be taken to be less favourable to the accused on this matter than the English Law, but as indicated in the instant decision the fact of silence of the accused may no doubt in a proper case be taken into account with all the other circumstances of the case, remembering however all the while that an accused person has always a right to remain silent if he wishes and that his silence must never be allowed in any degree to become a substitute for proof by the prosecution of its case.

SURAJ KUER *v.* SANT SINGH, I.L.R. (1941) All. 418.

This decision holds that a Court has no jurisdiction to demand from a plaintiff security for costs on grounds not provided for in Order 25, rule 1 of the Civil Procedure Code and therefore an order demanding such security cannot be justified even if the Court is satisfied that the plaintiff is conducting a litigation really for another. On a matter seemingly so simple, it is remarkable that there has been a conflict of judicial opinion regarding the powers of the Court. The Civil Procedure Code of 1859 contained no provisions governing security for costs to be taken from a plaintiff. Such provisions came into existence only later. Prior to that time the English practice on the point was being followed in India, see *Chunder Cant Mookerjee* v. *Ram Coomar Coondoo*[6], *Ram Coomar Coondoo* v. *Chunder Cant Mookerjee*[7]. According to that practice it was competent to the Court to demand security for costs from the plaintiff where it was clear that he was not the real litigant but was only a puppet in the hands of others. Thus in *Cowell* v. *Taylor*[8], Bowen, L.J., observed, "that in order to prevent abuse, if an insolvent sues as a nominal plaintiff for the benefit of somebody else he must give security." Following the English practice, in *Ram Coomar Coondoo's case*[7], Sir Montague Smith

1. (1915) 19 C.W.N. 1043.
2. (1915) I.L.R 42 Cal. 957.
3. A.I.R. 1931 Lah. 178.
4. A.I.R. 1940 Cal. 250.
5. (1936) I.L.R. 14 Rang. 666 (F.B.).
6. (1874) 22 W.R. 138.
7. (1876) I.L R. 2 Cal. 233.
8. (1885) 31 Ch. D. 34.

remarked that where it appears that the plaintiff in a suit is in fact suing on behalf of another person who is not a party to the record, the *ordinary practice* is to require security for costs. The question is whether in view of the specific provisions in the Civil Procedure Code, subsequent to the Code of 1859, the English practice can still be followed. It is true as observed by Lord Davey in *Gokul Mandur* v. *Pudmanund Singh*[1], the essence of a Code is to be exhaustive on the matters in respect of which it declares the law and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction. Order 25 is headed "security for costs" and the marginal note to rule 1 reads "when security for costs may be required from plaintiff." The rule does not however contain any language suggesting an exhaustive enumeration of cases when security may be ordered. Where a particular right is allowed or relief permitted under certain circumstances only or on certain grounds alone and in no other case it has generally been so stated, [*see* section 101 (second appeals) section 104 (orders from which an appeal lies), Order 20, rule 3 (additions and alterations in judgments after being signed)]. Where no such limitation is to be found the provision of law concerned is not ordinarily considered to be exhaustive and as precluding the exercise of its inherent powers by the Court [*see* section 11 (*res judicata*), section 144 (restitution), Order 21, rule 92 (setting aside or confirming execution sales), Order 41, rule 20 (addition and transposition of parties), Order 41, rule 23 (remand), etc.]. The language of Order 41, rule 10 empowering an appellate Court to require an appellant to furnish security for costs is also significant in this connection. Under this last provision while in the specified cases security for costs shall be ordered, in other cases the matter is left entirely to the discretion of the Court, thereby indicating that the enumeration is merely to guide the Court as to the cases where according to the Legislature security shall be ordered, leaving cases outside the enumerated categories to be dealt with by the Court according to the special circumstances of such cases. *Prima facie* therefore there is no reason to read O. 25, r. 1 as exhaustive of the grounds on which the plaintiff can be directed to give security for costs. Nor will it be permissible to invoke the maxim *expressio unius est exclusio alterius*. An expression of an affirmative cannot be read as a negation of what is not affirmed except where it follows as a necessary or reasonable implication from the language of the statute. As stated by Woodroffe, J., in *Hukum Chund Boid* v. *Kamalanund*[2], the Civil Procedure Code does not provide for all cases and it does not affect the previously existing powers of the Court except where they are expressly taken away, see also *Durga Dihal Das* v. *Anoraji*[3]. Turning to the decisions, in Calcutta, Bombay, Sind and Madras it has been held that a Court has power to require security for costs, for instance, where it finds that a person who has an interest in having a question decided puts forward another to have it tried in a suit in that other's name, in

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1. (1902) L. R. 29 I.A. 196: I.L.R. 29 Cal. 707 (P.C.).
2. (1906) I.L.R. 33 Cal. 927, 931.
3. (1895) I.L.R. 17 All, 29.

other words, where the plaintiff is not the real litigant, *Ram Coomar Coondoo* v. *Chunder Cant Mookerjee*[1], *Khajah Assenoollajoo* v. *Solomon*[2], *Hari Nath Singh* v. *Ram Kumar Bagchi*[3], *Bomanji* v. *Nusserwanji*[4], *Chainrai Valiram* v. *The Sunday Times*[5], *Ramasami Pillai* v. *Krishnammal*[6]. It is true that in *Bhairabendra Narain Deb* v. *Udai Narain Deb*[7], Cuming, J., has observed: "Had the Code been entirely silent on the point, then possibly the inherent power of the Court might have been invoked, but when the Code does make certain provisions for the taking of security for costs from the plaintiff it seems . . . . . that in those cases and those cases only may costs be taken from the plaintiff and that for security for costs to be demanded from the plaintiff the case must fall within the purview of Order 25, rule 1." This statement runs counter to the precedents in Calcutta and elsewhere. Also as pointed out in *Chainrai Valiram's case*[5], it loses sight of the fact that merely because the Legislature has provided for security being ordered in certain specified cases it cannot be said that the Legislature has thereby intended to deprive the Court of its inherent jurisdiction to act *ex debito justitiae* and make similar orders in cases not specifically provided for. These reasons suggest that the view taken in the decision under notice regarding the scope of Order 25, rule 1 may require further and fuller consideration.

OUSHADESWARA SWAMI TEMPLE *v.* SAMIAPPA MUDALIAR, (1942) 1 M.L.J. 99.

This decision holds that a trustee is not debarred from purchasing property which was once trust property but had become lost to the trust by adverse possession before he became a trustee. Section 3 of the Trusts Act states that whatever validly formed the subject-matter of the trust is trust property. The test as between the trustee and the beneficiary of trust property is thus whether the property concerned was in fact the subject-matter of the trust at the time of its creation. There is nothing in the section to suggest that if any item was lost to the trust at any time subsequently it would for all purposes cease to be trust property. Section 13 prescribes that the trustee should take such steps as may be reasonably requisite for the assertion or protection of the title to trust property and according to section 14 a trustee must not "aid" any title to the trust property adverse to the interests of the beneficiary. It will be a question of some nicety whether the recognition by a trustee of property as having ceased to be trust property through the accrual of a prescriptive title thereto in favour of his vendor, and his purchasing such property will not be tantamount to "aiding" by the trustee of an adverse title within the meaning of

1. (1876) L.R. 4 I.A. 23: I.L.R. 2 Cal. 233 (P.C.).
2. (1887) I.L.R. 14 Cal. 533.
3. (1913) 18 C.W.N. 119.
4. (1902) I.L.R. 27 Bom. 100.
5. A.I.R. 1932 Sind 33.
6. (1935) 69 M.L.J. 38.
7. (1923) I.L.R. 50 Cal. 853.

section 14. In *Bennet* v. *Burgis*[1], where after a part of the trust property had been lost a suit was brought for the appointment of new trustees in regard to the remainder, Sir James Wigram, V.C., held that the new trustees should in any event be trustees of *the whole of the properties comprised in the settlement* and that to afford them protection an inquiry should be directed to ascertain what part of the properties had been lost and whether any steps ought to be taken for the recovery of such property. The order proposed suggests that though for purposes of accountability and administration the property lost could be counted out yet the relationship between the parties for other purposes would be that of trustee and *cestui que trust* not in regard to the properties that were still with the trust merely but in regard to the entirety of the properties that formed the subject of the settlement, subject however to what had been carried off by alienations within the competency of the trustee. The distinction drawn between a trustee and a stranger in regard to purchase of trust property (*see* section 65) strengthens this conclusion. It is the status of the person as trustee at the moment of purchase that leads to the avoidance of the conveyance of trust property either directly to himself or indirectly by a conveyance to a third person having no notice of the trust in the first instance and a repurchase of the property subsequently from him. The ruling in *Boles and British Land Co.'s Contract*, In re[2], that the mere fact that a man has once been a trustee twelve years before the sale is no reason why he should not purchase the property, is perfectly consistent with this principle. The person having shed his character as trustee long before the transaction, he was no longer a person under disability. Likewise the observation of Lord Hobhouse in *Clark* v. *Clark*[3] that "their Lordships cannot agree that a sale is to be avoided, merely because when entered upon the purchaser may, at his option, become the trustee of the property purchased" in no way affects the test suggested. The deciding factor then is not whether the purchaser in fact was, or was likely to become a trustee under the settlement at any time, but whether he had that status when he bought the property covered by the trust instrument. If therefore the conclusions, that whatever formed the subject-matter of the trust always remained trust property between the trustee and the *cestui que trust*, except perhaps in respect of accountability, notwithstanding that it or a portion of it had been lost to the trust, and that it is the status of the purchaser as trustee at the time of his purchase of trust property which invalidates the purchase, are correct, the fact that in the instant case the trust property had been lost to the trust through the negligence of the previous trustees permitting the accrual of a title by prescription in favour of the vendor will not render the property any the less trust property with reference to the trustee invalidating a purchase thereof by him while still retaining the character of a trustee.

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1. (1846) 5 Hare 295: 67 E.R. 925.
2. (1902) 1 Ch. 244.
3. (1884) 9 App. Cas. 733.

KANAGAVELU NADAR *v.* SUBBIER, (1942) 1 M.L.J. 353.

A point, almost one of first impression, was decided in this case, when it was held that the principle of section 62 of the Indian Trust Act would be applicable to the case of public religious trusts as well. Section 62 provides that where at the instance of the beneficiary any property wrongfully alienated by the trustee to himself or another is recovered the beneficiary must repay the purchase money paid with interest. The English rule is similar. The *cestui que trust* can have the property reconveyed to him on the one hand repaying the price at which the trustee bought with interest at 4 per cent. and the trustee or purchaser on the other accounting for the profits of the estate, Lewin on Trusts (14th edn.), pp. 832, 833, *Hall* v. *Hallet*[1], *York Buildings Co.* v. *Mackenzie*[2], Ex parte *James*[3], *Watson* v. *Toone*[4]. The reason behind the rule is universal and not special, namely, that there should be no "unjust enrichment". In English law, except under an express power trustees of charities could not, as a general rule, even before the restrictions imposed by the Charitable Trusts Acts, make an absolute disposition of the charity estate. Where a deed of transfer is cancelled by the Court the parties are put in exactly the same situation as if no such deed had ever been executed, *Hoghton* v. *Hoghton*[5]. It would therefore follow that any benefit had by the charity will have to be refunded if the alienated property is to be recovered. The question never turned on whether the alienation was void or voidable but whether an institution specially protected by the equitable jurisdiction of the courts can retain a benefit in a manner which equity cannot approve of. In *Attorney-General* v. *Kerr*[6]. in setting aside certain leases and a conveyance of the fee simple in certain charity properties, the Master of the Rolls directed compensation for improvements to be paid and stated "The charity having equity done, it must certainly do equity". It is well settled in English law that in the absence of collusion or fraud the Court may on setting aside a sale of charity property direct that an allowance should be made in respect of buildings or other permanent improvements erected or made upon the land. In *Attorney-General* v. *Magdalen College*[7] in setting aside an alienation of charity property, the Master of the Rolls ordered: "I shall accordingly declare the conveyance to be void and direct it to be delivered up and cancelled"; and added that an account should be taken of the rents and profits since the filing of the suit directing "all just allowances." The principle of these decisions by which compensation for improvements and "all just allowances" are permitted would equally extend to the refunding of the purchase money and the argument is quite legitimate that the charity cannot at the same time retain the benefit received and yet get back the property forming the consideration therefor.

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1. (1784) 1 Cox. 134, 139: 29 E.R. 1096.
2. (1795) 8 Bro. P. C. 42.
3. (1803) 8 Ves. 337, 351: 32 E. R. 385.
4. (1820) 6 Madd. 153: 56 E.R. 1050.
5. (1852) 15 Beav. 278: 51 E.R. 545.
6. (1840) 6 L. J. Ch. 190.
7. (1854) 18 Beav. 223: 52 E.R. 88.

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NOTES OF RECENT CASES.

Wadsworth, J.
2nd April, 1942.

Vyaghreswarudu *v.* Bhadramma.
C.R.P. No. 718 of 1940.

Hindu law—Family debt—Insolvent father—Power to acknowledge debt.

Where there is a family debt a Hindu father who continues to be the joint family manager can even after his adjudication as an insolvent save limitation by his acknowledgment as against the other coparceners. If an insolvent after his adjudication can acknowledge his own debt he can equally acknowledge a debt binding on the family of which he still remains the manager notwithstanding his insolvency.

K. Bhimasankaram for Petitioner.

P. Somasundaram and *P. Suryanarayana* for Respondent.

K.S.

Horwill, J.
30th June, 1942.

Dakshinamurthi, *In re.*
Crl. R. C. No. 192 of 1942.
(Crl. R. P. No. 179 of 1942.)

Criminal Procedure Code (V of 1898), S. 370 (1)—Necessity to state reasons for conviction—Procedure.

S. 370 (1) of the Code of Criminal Procedure requires the Magistrate to give a brief statement of the reasons for the conviction of an accused. A brief statement of the reasons for conviction would necessitate a reference to what the prosecution witnesses had said, so that it could be shown that that evidence if believed would establish the offence with which the accused had been charged. If there had been no defence witnesses, it would have been sufficient if the Magistrate had said that he believed the prosecution witnesses but when there is defence evidence which is inconsistent with the prosecution story some brief reasons should also be given as to why the defence evidence should be discredited.

V. N. Shama Rao and *B. T. Sundararajan* for Accused.

T. Ramaseshan for Crown Prosecutor on behalf of the Crown.

K.S.

Horwill, J.
30th June, 1942.

The Public Prosecutor *v.* Rajam Ammal.
Crl. R. C. No. 231 of 1942.
(Crl. R. P. No. 217 of 1942.)

Borstal Schools Act (V of 1926)—Not applicable to adolescent girls.

S. 2 of the Borstal Schools Act says that the Provincial Government may by notification from time to time, apply the whole or any of the provisions of the Act to adolescent offenders or any class thereof in any local

area in the presidency of Madras. By Law (General) Department Notification No. 64 of 26th January, 1927 (*Fort St. George Gazette*) the Act was made applicable to adolescent offenders of the male sex. Accordingly adolescent girls cannot be sent to a Borstal School and must be convicted in the ordinary way.

N. Somasundaram for Public Prosecutor.

Accused not represented.

K.S.

Horwill, J.
1st July, 1942.

Kandaswamy Pillai *v.* Municipal Prosecutor, Palghat.
Crl. R. C. No. 178 of 1942.
(Crl. R. P. No. 165 of 1942.)

Madras District Municipalities Act (V of 1920), S. 181 (2)—Panels of window swinging over road only in the process of opening and shutting—Not hit by the section.

What is prohibited by S. 181 of the District Municipalities Act is the erecting without licence of a window, door, gate or bar that, when in its normal open position projects over the street. Accordingly where a window was parallel to the wall adjoining a street and it was only in the process of opening and shutting that the panels of the window swung over a small area of the street and did not project on the road when fastened or shut, it did not come within the mischief of S. 181 (2) of the Act.

S. V. Venkatasubramaniam for Petitioner.

A. S. Sivakaminathan for Public Prosecutor.

K.S.

Horwill, J.
1st July, 1942.

Appalaswamy. *In re.*
Crl. R. C. No. 258 of 1942.
(Crl. R. P. No. 244 of 1942.)

Defence of India Rules (1939)—Mere possession of literature containing seditious views—Heavy sentence—Liability for.

Possession *simpliciter* of seditious literature or manuscripts is liable to draw a heavy sentence under the Defence of India Rules. Where the manuscript found in the accused's possession indicated that the literature was intended to be disseminated the fact that the accused did not own the literature is no ground for reducing the sentence.

M. Appa Rao for Accused.

N. Somasundaram for Public Prosecutor on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J.
29th June, 1942.

Abdul Subhan Sahib *v.*
Abdul Ravoof Sahib.
S.A. No. 924 of 1941.

Partnership Act (IX of 1932), *S.* 69 (2)—*Scope and applicability.*

S. 69 (2) of the Partnership Act has no application to a suit for the enforcement of an agreement entered into after the dissolution or at the time of the dissolution between the partners of an unregistered firm under which some definite amount was payable by one partner to another because it does not relate to a suit on behalf of the partnership.

I.L.R. (1937) Bom. 628 and A.I.R. 1938 Rang. 108, distinguished.

K. P. Ramakrishna Aiyar for Appellant.

B. Pocker for Respondent.

K.S.

Kuppuswami Ayyar, J.
2nd July, 1942.

Sathappa Chetti *v.*
Thayyanayaki Ammal.
S.A. No. 978 of 1940.

Adverse possession—Delivery of symbolical possession during the period of adverse possession—Effect.

Where the plaintiff was entitled to take actual possession of the property purchased by him in a revenue sale but instead he got only symbolical possession in respect of a building on the site in the occupation of the defendant, the taking of symbolical possession interfered with the possession of the defendant and the defendant could start his adverse possession only from the date of the delivery of the symbolical possession.

(1927) 53 M.L.J. 339, relied on.

N. G. Krishna Aiyangar for Appellant.

M. S. Venkatarama Aiyar for Respondent.

K.S.

Horwill, J.
3rd July, 1942.

Sundaresam Pillai *v.*
Ramachandra Pillai.
C.R.P. No. 593 of 1941.

Civil Procedure Code (V of 1908), *O.* 9, *r.* 9—*Scope.*

O. 9, r. 9 of the Civil Procedure Code permits the setting aside of an *ex parte* decree only when the plaintiff is unable to be present; and that inability does not mean inability to raise the wherewithal to continue the suit—whether due to lack of funds or absence of witness—but some physical inability due to the break down of a conveyance or illness.

S. Panchapagesa Sastri and *P. S. Ramachandran* for Petitioner.

R. Swaminatha Aiyar for Respondent.

K.S.

Horwill, J.
9th July, 1942.

Govindan, *In re.*
Cr.R.C. No. 197 of 1942.
(Cr.R.P. No. 184 of 1942).

Cantonments Act (II of 1924), *S.* 118 *(a) (ii)—Offence punishable under—Form of order.*

In a summary trial for an offence of using threatening and abusive or insulting words punishable under S. 118 *(a) (ii)* of the Cantonments Act though it is not necessary that the Magistrate should record what the prosecution witnesses actually said, it is however necessary in convicting the accused to give a brief statement of the reasons. Such a statement of reasons would necessitate at least a short summary of what the prosecution witnesses had said so as to indicate that the evidence had made out the case with which the accused had been charged and also that the Magistrates had believed that evidence. If there was defence evidence it would further be necessary to say why they preferred the evidence of the prosecution to that of the defence.

N K C

K. V. Ramaseshan for Petitioner.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

Mockett and Happell, JJ. Chevveti Ramudu, *In re.*
14th July, 1942. **R.T. No. 88 of 1942.**

Criminal Trial—Offence of murder—Accused of or above sixteen years of age—If ground for commuting sentence of death.

There is no provision of law that sentence of death shall not be passed on a person of or above sixteen years of age. S. 22 of the Madras Children Act porvides that no 'child' (that is a person of or under fourteen years of age) shall be sentenced to death. A sentence of death cannot be commuted in the absence of mitigating circumstances purely on the ground of the young age of the accused. To do so will be to extend the scope of the Children Act beyond the age contemplated by the legislature. The prerogative of mercy in individual cases lies with the Provincial Government and it is for the Legislature to amend the Children Act, if an amendment seems required and to fix the age limit below which sentence of death shall not be passed.

S. Suryaprakasam for Accused.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

Horwill, J. Padmanabha Chetty, *In re.*
16th July, 1942.

Crl.R.C. No. 139 of 1942.
(Crl.R.P. No. 129 of 1942).

Madras Prevention of Adulteration Act (III of 1918), S. 5, Cl. (1) (a) and (b), rr. 28 and 29—Adulteration of butter—Figures given by analyst—Value.

The Reichart Wollney and Saponification numbers, etc., found on tests by the analyst of sample butter notwithstanding that they are abnormally low, establish beyond reasonable doubt that they are inconsistent with the purity of the sample. Abnormality in the Reichart Wollney numbers does not necessarily mean adulteration.

V. Rajagopala Mudaliar for Accused.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

K.S.

Horwill, J. Varadaraja Padayachi, *In re.*
17th July, 1942. **Cr.R.C. No. 227 of 1942.**
(Case Referred No. 13 of 1942).

Criminal Procedure Code (V of 1898), S. 562—Not to be applied to persons over 21 years of age in relation to offences punishable with sentences exceeding seven years.

If S. 562 of the Criminal Procedure Code is to be applied to persons over 21 years of age it must be only in relation to offences that are punishable with sentences not exceeding seven years. Where a person over 21 years of age is found guilty of house breaking as well as of theft in a building, S. 454 of the Penal Code requires a sentence of imprisonment to be given and an order under S. 562 of the Criminal Procedure Code cannot be passed.

A. S. Sivakaminathan for Accused.

K. Venkataraghavachari for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Byers, J. Albuquerque *v.* The Catholic Bank, Ltd.,
29th June, 1942. Mangalore and others.
S.A. No. 1173 of 1940.

Company—Banking company—Provision in articles of association that office of director shall ipso facto *be vacated "if he becomes incapable of acting as a director"—Default of director in repaying loan to bank—If incapacitates him.*

One of the articles of association of a banking company declared that the office of a director shall be vacated "if he resigns or for any other reason becomes incapable of acting as a director". In the case of a director who had defaulted in repaying a loan to the bank,

Held, that, the exclusion of the new S. 86-D (1) of the Indian Companies Act from banking companies under Cl. (3) of the same section makes it clear that loans to directors of a bank are contemplated as part of its business and it cannot be said that indebtedness to the bank would incapacitate a director. The article contemplates some incapacity such as illness, long absence, imprisonment, insanity or any other incapacity.

R. Rajeswara Rao and *Messrs. John* and *Row* for Appellant.

B. Sitarama Rao and *S. J. S. Fernandez* for Respondents.

K.S.

[F.B.]

The Chief Justice, Lakshmana Rao and Krishnaswami Ayyangar, JJ.
6th July, 1942.

Palani Pillai and others *v.* Anyath Ibrahim Rowther and another.
S.A. No. 753 of 1940.

Limitation Act (IX of 1908), *Art.* 144—*Applicability—Usufructuary mortgage of some items of property by some members of a Muhammadan family—Mortgagee entering into possession of mortgaged items—Limitation and adverse possession against other co-owners—Commencement.*

Where some co-owners usufructuarily mortgage specific items of property held by the members of a Muhammadan family and the mortgagee enters into possession of the mortgaged items under his mortgage-deed, a suit to recover their share therein is barred by Art. 144 of the Limitation Act at the end of twelve years of such possession and adverse possession as against the other members cannot be said to begin only from the date of ouster to their knowledge.

K. S. Sankara Aiyar for Appellants.

S. Rangachari for Respondents.

K.S.

Mockett and Happell, JJ. Manolachandu, *In re.*
22nd July, 1942. R.T. No. 94 of 1942.

Criminal Trial—Evidence of witness tallying in the main with accused's statement but trying to exculpate deponent and inculpate only the accused—Value of evidence.

Where the evidence of a witness tallies in the main with the accused's statement but tries to exculpate the deponent and inculpate only the accused and differs from the accused's statement to that extent, his evidence could not be taken into consideration under S. 30 of the Evidence Act, as against a co-accused if the witness had stood in the dock with the accused. The evidence therefore cannot be relied on as corroborating the statement of the accused though the witness was not on his trial.

M. Srinivasa Rao for Accused.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

Horwill, J. Pedda Kambi Reddy, *In re* and others.
24th July, 1942. Cr. R. C. No. 266 of 1942.
(Cr. R. P. No. 252 of 1942.)

Criminal Procedure Code (V of 1898), *S.* 349—*Sub-Magistrate finding that accused ought to be dealt with in a manner beyond his own powers*

referring case to Joint Magistrate—Procedure to be followed by Joint Magistrate.

A Sub-Magistrate, being of opinion that the accused ought to be dealt with in a manner beyond his own powers, acted under S. 349 of the Code of Criminal Procedure and referred the case to the Joint Magistrate having jurisdiction. On the question of procedure to be followed by the Joint Magistrate,

Held, the case, after the reference to him, was a continuation of the original trial; and the accused had the same rights as they had before the reference. The Joint Magistrate was under the same obligation to hear arguments from the pleaders present and to write a judgment giving his reasons for his order as in an ordinary calendar case tried entirely by him. A judgment prefixing the order with the words "The facts of the case are stated below in the words of the Sub-Magistrate," then embodying the Sub-Magistrate's order verbatim and adding at the end "I am of opinion that a bond for keeping the peace should be taken from them. I order all the accused under S. 106 (1), Cr. P. Code, to execute a bond"—is not a proper judgment and must be set aside.

A. Bhujanga Rao for Petitioners.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

[F.B.]

The Chief Justice, Lakshmana Rao and Krishnaswami Ayyangar, JJ.
28th July, 1942.

Nori Rama Sastrulu *v.* Teluguntla Balakrishna Rao and another.
L.P.A. No. 47 of 1940.

Provincial Insolvency Act (V of 1920), S. 28 (2)—Vesting—Insolvency of manager of joint Hindu family—Manager's power of sale over joint family properties—Does not vest in Official Receiver—Need for intervention of Central Legislature to bring the provisions of the Provincial Act in conformity with S. 52 of the Presidency Towns Insolvency Act.

Under the Provincial Insolvency Act on the adjudication as insolvent of the manager of a joint Hindu family his power of sale over the joint family property does not vest in the Official Receiver as the power cannot be regarded as "property". Such power vests only under S. 52 of the Presidency Towns Insolvency Act which has no counterpart in the Provincial Act.

The desirability of intervention of the Central Legislature to bring the two Acts into line pointed out.

K. Rajah Aiyar and *A. Venkatachalam* for Appellant.

V. Govindarajachari and *P. Satyanarayana Rao* for Respondents.

K.S.

Horwill, J.
30th July, 1942.

Appanna and others, *In re.*
Crl. R. C. No. 237 of 1942.
(Crl. R. P. No. 223 of 1942.)

Criminal Trial—Bench consisting of three Magistrates—Necessity for all of them to sit throughout, hear evidence and sign the judgment.

Where a Bench consisted of three Magistrates and those three Magistrates did not sit throughout,

Held: When the three Magistrates were not sitting the Bench was not legally constituted and it is necessary that the same Magistrates should sit throughout, hear all the evidence, and sign the judgment.

S. Suryaprakasam for Accused.

S. Vepa for Complainant.

K. V. Chari for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

Horwill, J. Narayanaswami *v.* Sriranganaikulu.
3rd July, 1942. C.R.P. No. 342 of 1942.

Civil Procedure Code (V of 1908), O. 47, r. 9—Review application precluded by—Court has no inherent jurisdiction under sections 149 and 151 to grant review.

The Court has no inherent power to grant a review under sections 149 and 151 of the Civil Procedure Code. Accordingly where it is found that O. 47, r. 9 did not permit of a review, the Court has no jurisdiction to allow a review application on the ground that it is a hard case.

P. Suryanarayana for Petitioner.

K. Bhimasankaram for Respondent.

K. S.

Horwill, J. Ramalingayya, *In re.* Petr.
10th July, 1942. Crl.R.C. No. 214 of 1942.
(Crl.R.P. No. 201 of 1942).

Defence of India Rules (1939)—*r.* 19 (1) (a) *and* (5)—*Sending by post to a destination outside British India a letter containing a Code for secretly conveying information—Interception of letter by censor—If makes it "not sent"—Secret Code—Tests—Criminal trial—Sentence—Imprisonment till rising of Court—Propriety.*

In a prosecution for an offence punishable under r. 19 (1) (*a*) and (5) of the Defence of India Rules of sending by post to a destination outside British India a "Code" for being used as a means of secretly conveying information it was contended *inter alia* that as the letter was intercepted by the censor the letter could not be deemed to be sent.

Held, that the article "is sent", if it is started on its way to its destination. The fact that it did not arrive at its destination cannot alter the fact that it was sent.

A "Code" does not cease to be a secret Code, because a number of other persons are using it, if it is not generally known or used by persons engaged in the business for which the Code in question is employed.

Even in cases where the alternative of fine is not permissible by law, it is objectionable to sentence persons to imprisonment till the rising of the Court; because it is not a form of imprisonment recognised by law, and it is used to circumvent the provisions of law that require a sentence of imprisonment in jail for a particular term. Where the law permits of a sentence of fine as an alternative, there is no need for a sentence of imprisonment at all if it is thought that the offence does not merit it.

K. Umamaheswaram for Petitioner.

K. Venkataraghavachari for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K. S.

Horwill, J. Appalaswamy and another, Accused.
29th July, 1942. Crl.R.C. No. 206 of 1942.
(Crl.R.P. No. 203 of 1942).

Defence of India Rules (1939), *rr.* 35 (4) *and* 38 (5)—*"Prejudicial Act"—Bringing about strike by workers of mill to redress grievance—Knowledge that war work would be impeded—If makes the strike a prejudicial act "without lawful excuse."*

Where the motive for the calling of a strike was to remedy what the accused and others considered to be an arbitrary exercise of the employer's power of dismissal without a fair inquiry and without giving a reasonable warning to a worker and there was no other method of redressing their grievance except by going on strike, it must be held that they had a "lawful excuse" for the strike even though the accused knew that as a result of the strike essential war work would be impeded.

C. V. Dikshitulu for *B. Jagannadha Das* for Petitioners.

K. Venkataraghavachari for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K. S.

NRC

Horwill, J.
29th July, 1942.

Chellappa Chettiar and others, Accused.
Crl. R. C. No. 314 of 1942.
(Case Referred No. 28 of 1942.)

Criminal Procedure Code (V of 1898), *S.* 528 (2)—*Case beyond jurisdiction of Sub-Magistrate—Power of District Magistrate to transfer—Exercise of—Procedure.*

The District Magistrate has as much power to transfer under S. 528 (2) of the Code of Criminal Procedure as the High Court has under S. 526. But neither the District Magistrate nor the High Court ought to transfer a case where the Subordinate Magistrate has no jurisdiction, the proper procedure in such a case being for the Sub-Magistrate to return the complaint stating that he may present the same to the Court having jurisdiction. The tribunal to decide whether the case is one within his jurisdiction and whether or not he should continue the trial is the Sub-Magistrate himself and not the District Magistrate or the High Court. It is always open to the Sub-Magistrate to try a case for a lesser offence than that disclosed in the complaint.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

G. N. Chari for Accused.

K.S.

Horwill, J.,
5th August, 1942.

Abdur Shukur Sahib, *In re.*
Crl.R.C. No. 370 of 1942.
(Crl.R.P. No.360 of 1942).

Criminal Trial—Complaint of preferring false or frivolous charge against police officers by letter to the District Superintendent of Police—Complaint to be filed where letter is received and not where it was posted.

The accused sent a petition to the District Superintendent of Police North Arcot containing various allegations against the police officials at Polur which were subsequently found to be false. The letter was posted at Polur and opened by the District Superintendent of Police at Vellore. In a complaint against the accused filed by the Police at Polur for preferring a false or frivolous charge against them,

Held, that the post office acted as the agent of the accused in carrying the letter to the District Superintendent of Police and the effect is the same as if the accused had handed over the letter in person at Vellore. The false or frivolous charge was therefore made at Vellore and not at Polur and the Magistrate having jurisdiction to entertain the complaint would be the Magistrate at Vellore.

A. S. Sivakaminathan for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K. S.

Horwill, J.
6th August, 1942.

Makky Moithu and others, Accused.
Crl.R.C. No. 212 of 1942.
(Crl.R.P. No. 199 of 1942).

Evidence Act (I of 1872), *section* 124—*Scope and applicability.*

In a prosecution for cutting trees and taking them away from the Government forest, on the question whether a certain report made by the Deputy Tahsildar in charge of the forest in question to the Collector was privileged,

Held, that section 124 of the Indian Evidence Act, leaves it to the Court to consider whether the communication was of the nature covered by the section (communications made in official confidence). If it is, the Court has to exclude the document if the Public Officer concerned considers that the public interests will suffer by the disclosure. The Court cannot question his decision on that point.

P. S. Narayanaswami Aiyar for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K. S.

Horwill, J.
30th July, 1942.

Rangaswami Naidu and another, *In re.*
Crl.R.C. No. 275 of 1942.
(Crl.R.P. No. 261 of 1942).

Criminal Procedure Code (V of 1898), *section* 107—*Security proceedings—Evidence of charge subject of a current trial—Admissibility.*

There is no illegality in admitting evidence in security proceedings of a specific charge which is the subject of a current trial. The scope of the two proceedings is entirely different, one being concerned with offences committed in the past and the other being concerned with the likelihood of a breach of the peace in the future. If the same evidence is relevant to both proceedings it can be used in both those proceedings.

28 Cr.L.J. 515 and 88 I.C. 362, relied on.

N. S. Mani for Petitioners.

K. Venkataraghavachari for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Horwill, J.
4th August, 1942.

Krishna Reddi *v.* Muniappa Reddi and others.
Crl.R.C. No. 256 of 1942.
(Crl.R.P. No. 242 of 1942).

Penal Code (XLV of 1860), *section* 378—*Theft—Fish in pond—When can form the subject of theft.*

As long as water flows in and out of a pond thereby enabling fish to enter and leave it, the fish are free and in a state of nature, and so no more belong to the owner of the pond than a bird that settles on a tree in a person's garden belongs to that person; but when once the water has fallen to such a level that fish cannot leave it then they are trapped and consequently in the possession of the owner of the pond. Then any person who takes fish from that pond without the owner's consent with intent to cause him loss, necessarily commits theft.

I.L.R. 5 Mad. 390 and I.L.R. 24 Mad. 81, distinguished.

1914 M.W.N. 168, I.L.R. 36 Mad. 472 and I.L.R. 51 Mad. 333, followed.

V. C. Viraraghavan for Petitioner.

K. Venkataraghavachari for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Horwill, J.
10th August, 1942.

Jayasudeen, *In re.*
Crl.R.C. No. 335 of 1942.
(Crl.R.P. No. 325 of 1942).

Madras Prohibition Act (X of 1937), *section* 3 (17)—*"Spirits"—If means only potable spirits—Spirits mixed with shellac—Introduction into prohibition area—Offence.*

The term "spirits" is defined in section 3 (17) of the Madras Prohibition Act as meaning any liquor containing alcohol and obtained by distillation (whether it is denatured or not). There is nothing in the Act which suggests that because some substance (*e.g.*, shellac) is mixed with the spirits that makes, it unfit for human consumption it is no longer "spirits." On the contrary, the very wording of section 3 (17) indicates that spirits which are not potable come within the definition of spirits. Even if the transport of such spirits is for industrial purposes a licence is required under section 18 of the Act.

The Attorney-General v. *Bailley,* (1847) 1 Exch. Rep. 281, distinguished.

Accordingly where the accused despatched from the Madras Central Station two drums which on examination on suspicion by the Police at Melpatti station were found to contain denatured spirit with some solid matter which might have been shellac and resin, he is guilty of an offence under section 4 (1) (*a*) of the Madras Prohibition Act.

S. Narayana Aiyangar for Accused.

C. D. Venkataraman for the Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

K.S.

N R C

Horwill, J. Kamakshi Naidu, *In re.*
11th August, 1942. Crl.R.C. No. 316 of 1942.
(Crl.R.P. No. 307 of 1942).

Evidence Act (I of 1872), *sections* 25 *and* 27—*Confession by accused as to criminal breach of trust outside the one for which he was under arrest —Admissibility.*

Section 25 to which section 27 of the Evidence Act is a proviso applies equally to confessions with regard to offences not under investigation as with regard to offences under investigation, Where a person while under custody for a criminal breach of trust in respect of a cycle that he had taken on hire and then sold, confessed that he had similarly sold another cycle and as a result of that confession that cycle was discovered, the confession is admissible on the plain words of section 27 of the Evidence Act.

I.L.R. (1937) Mad. 358 and 61 M.L.J. 860, referred to.

N. S. Mani for Petitioner.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Kunhi Raman, J. Subbaraman *v.* Perianna Chetti.
14th August, 1942. S.A. No. 758 of 1940.

Practice—False description of plaintiff as minor in a suit to have sale deed by plaintiff declared void as obtained by fraud and without consideration—Proper procedure.

In a suit by a next friend of a plaintiff falsely described as a minor praying that a sale deed executed by the plaintiff was void as obtained by fraud and without consideration,

Held, the plaintiff's case did not rest mainly upon the allegation of minority as in the case in (1940) 1 M.L.J. 337 in which case there might have been justification for holding that a discretion ought not to be exercised in favour of the plaintiff who had intentionally made incorrect statements about his age in the plaint. In the instant case the plaintiff had also relied upon fraud and absence of consideration in support of his case that the sale deed executed by him was not enforceable in law. When such an alternative casé was set forth in the plaint it was incumbent upon the Court to consider that aspect of the case as well and the suit in the special circumstances of the case ought not to be dismissed on the technical ground that it was, not maintainable because of the false description of the plaintiff as a minor in the plaint.

C. S. Venkatachariar for Appellant.

B. Sitarama Rao and *M. S. Ramachandra Rao* for *A. Bujanga Rao* and *D. R. Krishna Rao* for Respondent.

K.S.

Horwill, J. Krishanlal Roopchand and Company, *In re.*
17th August, 1942. Crl. App. No. 329 of 1942.

War Risks (Goods) Insurance Ordinance (IX of 1940), *section* 7—*Construction—Firm if 'person' liable for failure to insure goods.*

Any firm, registered or not, would be a 'person' within the meaning of the General Clauses Act, section 3 (39) and it cannot mean that the Government intended under the War Risks (Goods) Insurance Ordinance, section 7, that only private individuals carrying on business in their individual capacity should insure their goods. Accordingly, it is incumbent on 'firms' as well as private individuals trading as such to insure their goods under section 7 of the War Risks (Goods) Insurance Ordinance.

The use of the word "person" or "firm" in section 6 cannot affect the position.

A. Nagarajan for Accused.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

K.S.

King and Kunhi Raman, JJ. Basavayya *v.* Raghavayya.
14th August, 1942. **Appeal No. 213 of 1941.**

Limitation Act (IX of 1908), section 14—Scope and applicability—Petition by payee under promissory note for adjudication of maker an insolvent—Hearing of petition and dismissal on merits—Subsequent suit on promissory note—Section 14 of Limitation Act not applicable to save limitation.

A promissory note was in favour of the plaintiff executed in 1929 by the first defendant against whom in February, 1932, the plaintiff filed an insolvency petition which remained pending for nearly eight years and was finally dismissed in December, 1939. In August, 1940, the plaintiff brought a suit on the promissory note, contending that the suit fell within the provisions of section 14 of the Limitation Act. The reason why the insolvency petition was dismissed was that the plaintiff charged the first defendant with having alienated the greater part of his property in order fraudulently to prefer certain creditors and to defeat the interests of others and it was finally held that the alienations did not amount to any such fraudulent preference. On the facts of the instant case,

Held, that section 14 of the Limitation Act cannot be of any assistance to the plaintiff as the words "unable to entertain it" in that section cannot apply to the action of the Insolvency Court as the petition was heard on the merits.

A.I.R. 1935 Lah. 736 and 1937 M.W.N. 465 distinguished.

The plea of limitation is in no sense an unjust plea and it cannot be said that because a defendant has succeeded on a plea of limitation he should not be granted his costs.

P. Satyanarayana Rao for Appellant.

K. Raghuramiah and *N. V. B. Sankara Rao* for Respondents.

K.S.

Horwill, J. Chakrapani Chetty & Sons, *In re.*
19th August, 1942. **Crl.R.C. No. 508 of 1942.**
(Crl.R.P. No. 487 of 1942).

Opium Act (I of 1878), section 11—Car possessed under hire purchase used for transporting contraband opium and ganja—Confiscation—When proper.

Where a car in the possession of the accused under a hire purchase agreement was used by him for transporting large quantities of contraband opium and ganja, and the owner had received only one instalment towards the purchase of the car and had no reason to suspect that the car was being used for transporting opium it would be very hard to have the car confiscated. A conveyance ought not to be confiscated unless the owner knew or had reason to believe that his vehicle was likely to be used for such purpose. The discretion of the Magistrate to confiscate a vehicle cannot be questioned in a Civil Court but only by the Courts having appellate or revisional jurisdiction over the Magistrate.

G. Gopalaswami for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

NRC

Horwill, J.
19*th August,* 1942.

Rangiah—Accused.
Cr.R.C. No. 365 of 1942.
(Cr.R.P. No. 355 of 1942).

Penal Code (XLV of 1860)*, sections* 183 *and* 186—*Charge of carrying away property attached by Amin in execution of a Munsiff Court decree—Amin and Nazarat under supervision of Subordinate Judge in the place—Person duly authorised to file complaint.*

Where the charge was that the accused carried away the property which the amin had attached and in other ways obstructed him in executing a decree of the District Munsiff's Court and the amin was under the charge and direction of the Nazir subject to the supervision and control of the Subordinate Judge in that place the amin in the particular case is not subordinate to the District Munsiff. The complaint could be filed by the amin himself or by the Nazir or the Subordinate Judge or any of the superiors of the Subordinate Judge, but not by the District Munsiff.

B. Lakshminarayana for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Wadsworth, J.
27th August, 1942.

Nataraja Gramany *v.* Sivakolundu Gramany.
C.R.P. No. 1552 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), *sections* 20 *and* 19—*Stay under*—Ad interim *stay followed by an absolute order—Not permissible—Starting point of limitation for filing application under section* 19.

The procedure of an executing Court in granting an *ad interim* stay followed by an absolute order is not contemplated by section 20 of Act IV of 1938; when once a stay has been granted limitation for an application under section 19 will begin to run.

However, the order of the lower Court proceeding on a different view of the limitation question is not one without jurisdiction and therefore cannot be interfered with in revision.

R. Thirumalai Thathachariar for Petitioner.

M. Ranganatha Sastriar for Respondent.

K.S.

Horwill, J.
31*st August*, 1942.

Abdul Salam Rowther, *In re.*
Crl.R.C. No. 362 of 1942.
(Cr.R.P. No. 352 of 1942).

Motor Vehicles Act (IV of 1939), *section* 42—*"Use" and "permit the driver to use"—Construction.*

Section 42 (1) of the Motor Vehicles Act is general and prohibits the use of the transport vehicle in a public place save in accordance with the conditions of a permit granted or countersigned by proper authority. Where a driver took a car to convey himself to the Magistrate's Court—where he was being tried for driving without a licence—and back again he was certainly "using" the vehicle. But the owner of the vehicle cannot be said to have "permitted" the use of the vehicle. Mere negligence of the owner in not locking up his vehicle so that the driver could not take it, would not amount to "permitting" the use of the car.

John and *Row* for Petitioner.

K. Venkataraghavachari for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Abdur Rahman, J.
31*st August*, 1942.

Muniswami Reddi *v.* The Official Receiver, North Arcot.
A.A.A.O. No. 311 of 1941.

Provincial Insolvency Act (V of 1920), *section* 51 (1)—*"Benefit of execution"—Money paid under orders of Court—If can be retained by creditor—Dismissal of application for adjudication for default—Restoration—Permissibility.*

After an execution sale money was deposited in Court on 11th December, 1934. A creditor filed a petition for adjudication of the judgment-debtor as insolvent on 5th December, 1934, and an interim receiver was appointed. The executing Court passed an order that the sale proceeds of the judgment-debtor's property should remain in Court until final disposal of the insolvency petition. The insolvency petition was dismissed for default on the 12th July, 1935, and the executing decree-holder obtained an order for payment of the sale proceeds to him. The decree-holder got Rs. 1,490-11-4 from the execution Court on 7th August, 1935. An application for restoration of the insolvency petition had been made in the meantime and was accepted on the 4th November, 1935. The debtor was adjudged an insolvent on the 6th October, 1937, and the Official Receiver applied under section 4 of the Provincial Insolvency Act for the refund of the Rs. 1,490-11-4.

Held, the application was not one for setting aside the order of the executing Court but merely for the refund of the benefit of the execution

N.R.C.

which the creditor was not entitled to retain. This the Insolvency Court has jurisdiction to determine under section 4 of the Act. The fact that the decree-holder obtained payment under orders of Court is immaterial and the money must be refunded. Though there is no provision as to restoration, an application for restoration can be made to the Insolvency Court in accordance with the provisions of section 5 of the Provincial Insolvency Act.

T. L. Venkatarama Aiyar for Appellant.

N. R. Sesha Aiyar for Respondent.

K.S.

King and Kuppuswami Ayyar, JJ.
1st September, 1942.

Examiner of Local Fund Accounts, Madras. *v.* C. Subramania Mudaliar and others.
C.M.A. Nos. 127 and 128 of 1941.

Madras District Municipalities Act (V of 1920), *Schedule IV, rule* 62—*Right of appeal against order of District Judge—If retrospective.*

The right of appeal created by the new rule 62 of Schedule IV of Madras Act V of 1920 against an order of the District Court to set aside a surcharge order will not affect orders passed on petitions instituted before the rule came into force (July, 1939), though the order on such petition was passed later.

The right of a litigant to have a decision of a Court as final and not open to appeal is a substantive right existing at the time of the institution of the proceedings and cannot be taken away by later enactments or rules unless such an enactment or rule is given retrospective operation either expressly or by necessary intendment.

I.L.R. 52 Mad. 261 (F.B.) followed.

The Government Pleader (*K. Kuttikrishna Menon*) for Appellant.

S. Panchapagesa Sastri for Respondents.

K.S.

The Chief Justice and Lakshmana Rao, J.
18th September, 1942.

The Asiatic Government Security Life Assurance Co., Ltd., Bangalore *v.* The Debt Conciliation Board, Erode and another.
C.M.P. No. 1800 of 1942.

Madras Debt Conciliation Act (XI of 1936), *section* 9—*Proper procedure.*

Under section 9 of the Debt Conciliation Act the Debt Conciliation Board has power at any stage to dismiss an application, if it considers that it is not desirable or practicable to effect a settlement. Where a creditor made it clear to the Board that a settlement was not practicable, the Board instead of applying section 9 and dismissing the application directed on 12th February, 1942, a notice to issue under section 10 (1) requiring creditors to submit their statements by 14th May, 1942.

Held, that the Board should not have done so as it was merely helping the debtor in delaying the payment of moneys he owed. Nor was the Board justified in adjourning the case further to 16th June, 1942 and again to 29th July, 1942. The duty of the Board was to dismiss the petition when there was no hope of settlement.

V. Rajagopalachari for Petitioner.

N. Somasundaram for 2nd Respondent.

K.S.

Horwill, J. Krishnan *v.* Krishnan.
12th August, 1942. **C.R.P. No. 2768 of 1941.**

Madras Debt Conciliation Act (*XI of* 1936), *section* 14 (2)—*Agreement between decree-holder and judgment-debtor—Effect on decree—Attaching decree-holder of the decree—Right to execute decree despite the agreement.*

X applied on 6th November, 1939, to attach a decree obtained by a person *A* against *B*. Five days later *B* filed an application under the Debt Conciliation Act and notice was ordered to the decree-holder *A*. On 20th December, 1939, the attachment was ordered. On 22nd January, 1941, an agreement was entered into between *A* and *B* under section 14 (1) of the Debt Conciliation Act and duly registered whereby the debt of *A* was considerably reduced. When *X* put in an application to execute the attached decree,

Held: Though the agreement under section 14 (1) when registered takes effect as if it were a decree of a Civil Court and is executable as such, it does not supersede the decree obtained by the creditor in the Civil Court. The decree-holder *A* cannot execute because he would be met by the plea that he had entered into an agreement with the judgment-debtor *B* that he would receive a lesser amount. But such an agreement only binds the parties to it, and as such cannot be pleaded in bar of execution by *X* the attaching decree-holder.

K. N. Kumaran for Petitioner.

A. Atchuthan Nambiar for Respondent.

K.S.

Horwill, J. Narasinga Rao (Receiver) *v.* Rangayya and another.
27th August, 1942. **C.R.P. No. 701 of 1941.**

Limitation Act (*IX of* 1908), *sections* 19 *and* 20—*Open payment endorsed on promissory note not sufficient to save from bar of limitation—Endorsement not stating that payment was made towards the debt—If can serve as written acknowledgment under section* 19.

When the indorsement on a promissory note was "amount paid in cash (a specified date) is so much only" section 20 of the Limitation Act did not save a suit on the promissory note from the bar of limitation. Nor can the bare statement of payment in the indorsement serve as an acknowledgment of the debt under section 19. If limitation is to be saved under section 19, one must be able to read into an indorsement not merely that a payment has been made but that a further sum is admitted to be due.

A.I.R. 1939 Bom. 252, distinguished.

A decree cannot be said to be a consent decree merely because the defendants remained *ex parte*; it can be a consent decree only if the defendants appear and admit the claim.

(1920) L.R. 47 I.A. 200, distinguished.

B. V. Ramanarasu for Petitioner.

Respondent not represented.

K.S.

Horwill, J. Arumuga Thevar, *In re.*
31st August, 1942. **Crl. R. C. No. 417 of 1942.**
(Cr.R.P. No. 404 of 1942.)

Criminal Procedure Code (*V of* 1898), *section* 106—*Order for executing bond for keeping peace—Tacking on to conviction for petty offences—Propriety.*

It is generally undesirable where a person is charged with some petty offence, to tack on to some small sentence of fine an order under section 106 of the Criminal Procedure Code which in most cases in view of the poverty of the accused persons would necessitate their remaining in jail for a long period which very much exceeded the punishment legally permissible for the offence of which the accused were charged. An order under section 106 is of course legally permissible but should be used very sparingly in such cases. Before passing an order under section 106 the Magistrate should be satisfied on legal evidence that it is necessary to require the accused person to execute a bond for keeping the peace. The

period for which the bond is to be executed must be in proportion to the gravity of the offence committed.

V. T. Rangaswami Aiyangar for Petitioner.

K. Venkataraghavachari for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

King, J. Varadaramanjulu Naidu *v.* Kaunanoor Naidu.
21st September, 1942. **A.A.O. No. 241 of 1941.**

Criminal Procedure Code (V of 1898), section 195—Registrar of Presidency Small Cause Court—When a "Court" which can file a complaint under sections 193 and 199 of the Penal Code.

For the purposes of section 195 of the Code of Criminal Procedure, the Registrar of the Presidency Small Cause Court can never be deemed to be a "Court" unless he has been in some way or other specially empowered to be a Judge. Accordingly when the Registrar takes security and in order to do so incidentally takes from a party an affidavit the Registrar cannot be said to be acting as a Court and he cannot file a valid complaint against the party under section 195, Criminal Procedure Code for an offence under sections 193 and 199 of the Penal Code in connection with a false statement that a certain house was his own property alleged to have been made in the affidavit.

V. Rajagopala Mudaliar for Appellant.

Srinivasaraghavan for Respondent.

K.S.

King, J. Kadir Hussain Rowther and others *v.* Jamila Bi and another.
23rd September, 1942. **C.R.P. No. 410 of 1942.**

Practice—Suit to obtain share of deceased's estate—Value for purposes of jurisdiction and appeal.

Though the primary object of a suit by a co-heir is to obtain her own share of the deceased's estate the suit must be regarded as a suit for the administration of that estate. A decree in such a suit must necessarily affect the value of the whole estate. Accordingly where the value of the estate is Rs. 41,000 though the value of the plaintiff's share will come to less than Rs. 5,000, an appeal from a decree in such a suit must be filed in the High Court and not in the District Court.

(1926) I.L.R. 50 M. 646, applied.

(1929) 56 M.L.J. 394, considered.

T. R. Srinivasan for Petitioners.

K. Rajah Aiyar and *V. Seshadri* for Respondents.

K.S.

[F.B.]

The Chief Justice, Lakshmana Rao and Krishnaswami Ayyangar, JJ. Advocate-General, Madras *v.* Ramanatha Goenka.
23rd September, 1942. **Cr.M.P. No. 514 of 1942.**

Contempt—Article in newspaper suggesting in respect of a case decided that there could not be any proper judicial trial—Contempt.

A statement in an article in a newspaper relating to a particular case recited: "The prosecution clearly stated that the case was filed as the result of 'correspondence from Government' but with the blessings of the Magistrate refused to produce the correspondence and the statement had to go untested. Without meaning any disrespect, we doubt whether in any case where opinions count, any Subordinate Magistrate will give a judgment contrary to what he believes the Government of the day has decided. The fate of this case was sealed the minute, the police told the Magistrate that the Government was behind the prosecution."

Held, that this amounted to gross contempt.

The Advocate-General (*Sir A. Krishnaswamy Aiyar*) in person.

B. Sitarama Rao for *V. V. Srinivasa Aiyangar* and *V. C. Gopalaratnam* for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
15th September, 1942.

Madhurakavi Aiyangar *v.* Chinnasami Chetti & others.
A.A.O. No. 15 of 1941 and C.R.P. No. 651 of 1941.

Madras Agriculturists' Relief Act (IV of 1938), sections 19 and 8—Person taking a mortgage of properties purchased by a puisne mortgagee in discharge of his mortgage after a mortgage decree had been passed in a suit by the first mortgagee—If a "judgment-debtor" entitled to apply for scaling down—Section 8 (2) and (3)—Payments by agriculturists alone to be regarded in applying the section—Sale in execution without applying Act IV of 1938—If material irregularity under Order 21, rule 90 of the Civil Procedure Code.

On a mortgage of 1913 there was a final decree in 1919. The 7th defendant was a puisne mortgagee who subsequently purchased part of the property in discharge of his own mortgage. In 1929 a portion of the mortgaged property was sold in execution of the decree. In 1932 after *Y* had been recognised as the assignee decree-holder, the second lot was proclaimed for sale. Then the 7th defendant put forward an uncertified adjustment of the mortgage decree and claimed that the decree was satisfied except for a small amount. This application was eventually withdrawn in 1936. In April, 1937, the 7th defendant mortgaged certain items of the property purchased by him to *A* and died shortly thereafter. In July, 1937, a fresh proclamation was made and in August, 1938, a further portion of the hypotheca was sold and the sale confirmed. Then in April, 1939, the properties of which *A* was the mortgagee were brought to sale under the mortgage decree and purchased by the assignee decree-holder and before the confirmation of the sale *A* filed an application under section 47 and Order 21, rule 90 of the Civil Procedure Code to set aside the sale for material irregularity and another application under section 19 of Madras Act IV of 1938 for scaling down the mortgage decree on the footing that *A* was an agriculturist judgment-debtor entitled to the benefits of the Act in respect of the decree. In the circumstances,

Held: (*i*) The mere holding of the sale by the assignee decree-holder without first applying Act IV in favour of a person like *A* interested in the hypotheca would not amount to a material irregularity such as would justify the setting aside of the sale.

(*ii*) Though *A* had acquired an interest in the property bound by the mortgage decree long after the decree had been passed, he having acquired it before the 1st October, 1937, became liable to discharge the debt which bound the property and must be deemed to be a "judgment-debtor" entitled to apply under section 19 of Act IV of 1938 for scaling down the decree debt, if he is an agriculturist.

(*iii*) Section 8 (2) and the complementary section 8 (3) of Act IV of 1938 both deal only with the effect of payments by an agriculturist and in scaling down the debt regard will have to be had to the question whether any of the payments towards the debt were made by an agriculturist. The decision of this question will be affected by the date of death of any person who had made payments.

S. V. Venugopalachari for Appellant.

N. Rangachari for Respondent.

K.S.

Patanjali Sastri, J.
23rd September, 1942.

Paramasiva Udayar *v.* Muthuveera Mudaliar and others.
A.A.A.O. Nos. 233 and 234 of 1941.

Practice—Appeal—Order though in form purporting to be one settling sale proclamation, clearly adjudicating on rights of parties as affected by scaling down of decree under Madras Act IV of 1938—Appealability.

Where the order of the first Court though in form one purporting to settle the terms of a sale proclamation clearly adjudicates on the rights of parties as affected by the scaling down of the decree under Madras Act IV of 1938, an appeal against the order is clearly maintainable.

M. S. Vaidyanatha Aiyar for Petitioner.

A. V. Narayanaswami Aiyar for Respondent.

K. S.

Abdur Rahman, J.
2nd October, 1942.

Ananthakrishna Baliga, Petitioner.

C.M.P. Nos. 2026, 2028, 2030 and 2032 of 1942.

Civil Procedure Code (V of 1908), Order 33, rule 1 and Order 44—If applicable to applications for review by defendants or respondents in appeal.

In an application by the respondent in a batch of appeals for review of the judgment in *forma pauperis*,

Held: There is nothing in Order 33 of the Civil Procedure Code, which can help a defendant in asking for the indulgence granted to persons who wish to file suits in *forma pauperis* except perhaps in cases where he (*i.e.*, the defendant) is, for the purposes of the suit to be regarded as a plaintiff. The words of Order 33, rule 1, are unambiguous and cannot be construed so as to cover a defendant or a defence. 5 Cal. 819 not followed.

The Court possesses no powers to exempt a defendant or a respondent from paying the necessary Court-fee, even temporarily when they are required to pay the same at the time when proceedings are initiated by them except perhaps when they really stand in the position of a plaintiff or an appellant.

A petition for review cannot be regarded to be in the nature of a continuation of the suit.

There is no procedure which will entitle a Court to make an enquiry in regard to a respondent's *pauperism* after the appeal in regard to which he is making an application for review has been brought to a close.

P. G. Krishna Aiyar for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) for the Crown.

K.S.

King, J.
2nd October, 1942.

Haji Kadir Murthuza Hussain *v.* Mohamad Murthuza Hussain.

C.R.P. No. 2753 of 1941.

Mussalman Wakf Validating Act (VI of 1913), section 3—Wakfs validated under—Application under Act (XLII of 1923), sections 3, 5 and 10—When maintainable in respect of wakfs.

The words "for the maintenance and support wholly or partially of his family and children or descendants" in section 3 of Act VI of 1913, describe two possible sizes of wakfs, the first one being sufficiently large to maintain the family completely and the second one being insufficiently large for this purpose. The wakfs which are validated are those which are primarily and wholly for the purpose of supporting and maintaining the family, children or descendants of the creator of the wakf. All that the Act requires is that in case the family should one day become extinct there should be a provision in the wakf for the benefit of some religious, pious or charitable purpose.

Accordingly a petition to the District Judge under sections 3, 5 and 10 of Act XLII of 1923 is maintainable in respect of a wakf which subserves two purposes, partly charitable and partly private.

M. S. Venkatarama Aiyar for Petitioner.

C. Krishnamachariar for Respondent.

K. S.

Kuppuswami Ayyar, J. Marimuthu Pillai *v.* Province of Madras.
1st October, 1942. **S.A. No. 456 of 1941.**

Madras Irrigation Cess Act (VII of 1865), *section* 1 (b)—*Irrigation with water from tank fed by Government channel—Right of Government to levy cess.*

Certain lands were irrigated from a tank or *Kuttai* formed in patta land. But the Government claimed, that water flowing through a channel belonging to the Government being the main source of water supply to the tank, the Government was entitled to levy irrigation cess under section 1 (*b*) of the Madras Irrigation Cess Act.

Held, that the Government was entitled to levy the cess.

(1940) 1 M.L.J. 152, distinguished.

T. V. Muthukrishna Aiyar for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

K. S.

King, J. Vellayappan *v.* Palaniappa Chettiar.
2nd October, 1942. **C.R.P. No. 1253 of 1941.**

Civil Procedure Code (V of 1908), *sections* 47 *and* 73—*Scope.*

V, a member of a joint family, filed a suit in 1936, against his father and other members of the joint family and the Official Receiver of Rangoon, who represented his father's estate claiming to succeed to property which had belonged to his mother. A decree was given establishing this claim. *P,* a stranger had obtained a decree in a suit in Rangoon filed in 1921 against the same joint family in which *V* happened to be impleaded by name as well as his father. Monies were realised in execution of the decree in *P's* suit of 1921 in proceedings which had been transferred to Devakottai and *V* applied for rateable distribution.

The Subordinate Judge held that because *V* was himself a judgment-debtor in *P's* suit, he had no *locus standi* to apply for rateable distribution of any assets realised in execution of that decree. On revision,

Held, (1) Sections 73 and 47 of the Civil Procedure Code are mutually exclusive and in making his application under section 73, *V* must be deemed to be acting in his capacity as decree-holder in his own suit and cannot possibly be deemed to be acting in the capacity of a member of the joint family. Accordingly the revision petition cannot be rejected on the ground that *V's* only remedy was by way of appeal.

(2) On the merits both *V* and *P* having each obtained decrees against the fund or estate one must have a right to rateable distribution against the other. The fact that one of them was a judgment-debtor in the other suit is irrelevant.

T. M. Krishnaswami Aiyar and *M. S. Vaidyanatha Aiyar* for Petitioner.

V. Ramaswami Aiyar for Respondent.

K. S.

Kuppuswami Ayyar, J. Varalakshmamma *v.* Jannayya.
7th October, 1942. **C.M.S.A. No. 260 of 1940**
and
C.R.P. No. 2065 of 1940.

Civil Procedure Code (V of 1908), *Order* 21, *rules* 84 *and* 85—*Decree-holder auction-purchaser—If bound to pay within* 15 *days from date of sale the amount payable rateably to other creditors out of the sale proceeds.*

Under rules 84 and 85 of Order 21 of the Code of Civil Procedure, it is not the duty of the decree-holder auction-purchaser to pay within 15 days from the date of sale, that portion of the amount that may be payable rateably to the other creditors who may claim a share in the assets realised by the sale over and above the amounts deposited by him into Court representing the difference between the amount for which he purchased the properties and the amount due to him under his decree. Accordingly the Court has no jurisdiction to set aside an execution sale on the ground that the decree-holder

auction-purchaser had not deposited within 15 days of the sale the amount payable to the creditors entitled to rateable distribution.

I.L.R. 59 Mad. 342 and I.L.R. 11 Mad. 356, referred to.

P. Sivaramakrishnayya for Appellant.

A. Lakshmayya and *N. V. B. Sankara Rao* for Respondents.

K. S.

Horwill, J.
13*th October*, 1942.

Koman Nambiar and others *v.* Padmavathi Amma.
A.A.O. No. 472 of 1941.

Promissory note—Execution by a karnavan of a Malabar tarwad—Assignment of note—Enforceability by assignee against tarwad—Principles.

In a suit by the assignee of a promissory note executed by the karnavan of a tarwad,

Held: If it is not clear on the note itself that the karnavan executed it in a representative capacity the holder could only sue the family on the debt and unless that debt was properly assigned and the assignment properly stamped the holder of the note could not sue on the debt. Where however the document is clearly expressed to be in a representative capacity, then the person liable under the promissory note is not the person who executes but the firm or body that he represents; and that same liability would continue even though the promissory note was endorsed to others and an indorsee brought a suit.

P. Govinda Menon for Appellants.

T. Krishna Rao for Respondent.

K. S.

Happell, J.
15*th October*, 1942.

Sreenivasan *v.* Lakshmana Rao Saheb.
C.R.P. No. 1421 of 1941.

Civil Procedure Code (V of 1908), *Order* 33, *rule* 5 (d)—*Scope.*

An application for permission to sue as a pauper cannot be dismissed or the applicant called upon to pay court-fees merely on the ground that the contention of the respondent, that there was no cause of action, appeared to be tenable and might ultimately prove to be true.

N. Sivaramakrishna Aiyar for Petitioner.

T. P. Ramachandra Aiyar for Respondent.

K. S.

Happell, J.
15*th October*, 1942.

Pachayakkal *v.* Shanmughavelayudasami.
C.R.P. Nos. 2747, etc., of 1941.

Court-fees—Appeal against decree in redemption suit—Proper Court-fee—Court-Fees Act, section 7, *clause* (*ix*) *and Article* 1 *of Schedule I.*

If in an appeal against a decree in a suit brought for redemption the appeal relates only to the amount payable and not to the right of redemption, court-fee must be paid *ad valorem* on the amount claimed to be payable. Even where the appeal purports to dispute both the right of redemption and the amount payable if in substance it relates only to the amount payable there again court-fee must be paid *ad valorem* on the amount claimed. But if the right of redemption and the amount payable are disputed in appeal and both grounds are grounds in substance and not merely in form the court-fee payable will be as for a suit under section 7, clause (*ix*) of the Court-Fees Act.

It cannot be said that it is the form alone and not the substance of the appeal which determines the question of court-fees.

M. Krishna Bharathi and *S. Ramachandra Aiyar* for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) and *S. S. Ramachandra Aiyar* for Respondent.

K. S.

Happell, J. Lakshmana Reddiar *v.* Ramaswami Reddiar.
8th October, 1942.

C.R.P. No. 1093 of 1941.

Hindu Law—Widow—Borrowing for defence of suit—When for justifiable necessity.

Where a person filed a suit against his brother's widow for the appointment of himself as the receiver of the widow's estate on the ground of waste by her and the widow borrowed money for defending the suit, *Held*: that the litigation from her point of view was one for protecting her right during her lifetime to enjoy and manage the property. The result of the suit was not a matter with which the creditor was concerned and the creditor was entitled to recover from the estate.

V. Sundaresa Aiyar for Petitioner.

K. S. Desikan for Respondent.

K.S.

Kuppuswami Ayyar, J. Trichinopoly Municipal Council *v.*
12th October, 1942. Syed Joshi Muhammad.

A.A.A.O. No. 129 of 1941.

Execution—Return of application—Re-presentation along with subsequent application for execution—Effect on limitation.

A petition for execution cannot be considered to be pending in Court when as a matter of fact it had been returned to the petitioner for being represented by a particular date and he did not choose to do so. Where the petition was not pending in Court not because of the order but because he failed to comply with the order of return which directed him to furnish the sale papers within a particular date and re-present the petition, it cannot give a fresh starting point for a subsequent application for execution.

(1942) 1 M.L.J. 542 and (1942) 1 M.L.J. 1018, referred to.

B. Sitarama Rao for Appellant.

K. Aravamuda Aiyangar for Respondent.

K.S.

Chandrasekhara Ayyar, J. Manikyam *v.* Sambayya.
12th October, 1942.

C.R.P. No. 863 of 1941 etc.

Limitation Act (IX of 1908), section 20. (Proviso as amended)—Acknowledgment in writing signed by debtor—If should be addressed to the creditor.

A writing signed by the debtor constitutes a sufficient acknowledgment for the purposes of the proviso to section 20 of the Limitation Act. The section does not say that it should be a writing addressed by the debtor to the creditor. The earlier authorities which arose on the language of the section as it stood before the proviso was amended are not applicable.

P. Sivaramakrishnayya for Petitioner.

V. Damodara Rao for Respondent.

K.S.

Kuppuswami Ayyar, J. Venkata Reddi and others *v.* Nagi
13th October, 1942. Reddi and others.

S.A. No. 98 of 1941.

Evidence Act (I of 1872), section 35—Reports sent by revenue officials to their superiors—Admissibility in evidence.

In a case where the dispute was whether a channel was one of the sources of supply of water to an irrigation tank, and the reports sent by the village officers during an enquiry held by the Collector on a complaint of the villagers were relied on as evidence not of any opinion expressed by the officers with regard to the rights of parties but as evidence of the state of things as they were at the time the reports were sent, such reports are admissible as relevant evidence.

44 M.L.J. 132, applied.

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33 Mad. 21 and 1936 Lah. 37 (1), distinguished.

S. Venkatesa Aiyangar and *K. Kuppuswami* for Appellants.

M. Ranganatha Sastri and the Government Pleader (*K. Kuttikrishna Menon*) for Respondents.

K.S.

Horwill, J. Anantapur Municipal Council *v.* Diesel
14th October, 1942. and Electrical Company.

A.A.O. No. 205 of 1942.

Arbitration Act (X of 1940)—Applicability—Act how far retrospective.

Sections 47 and 48 of the Arbitration Act clearly show that the Act is intended to apply to all proceedings which had not begun when the Act came into force, although the agreement to refer to arbitration might have been entered into long before the Act was enacted.

S. Muthiah Mudaliar for Appellant.

V. S. Narasimhachar for Respondent.

K.S.

Happell, J. Province of Madras *v.* Maharaja of Jeypore.
14th October, 1942.

C.R.P. Nos. 941 to 951 of 1942.

Civil Procedure Code (V of 1908), section 80—Suits under section 14 of Madras Survey and Boundaries Act—Two months' notice under section 80 of the Civil Procedure Code—Necessity.

Notice—Day of service to be excluded from period of two months.

In the case of a suit brought under section 14 of the Madras Survey and Boundaries Act, there is no reason why the Government should not have the two months' notice required by section 80 of the Code. A.I.R. 1934 Bom. 162, distinguished. A suit against the Government under section 14 of the Survey and Boundaries Act is distinguishable from a suit under Order 21, rule 63 of the Code, for, a suit under section 14 of the Survey and Boundaries Act cannot be regarded as a suit in the nature of an appeal and notice cannot be dispensed with.

Even if the Government is added merely as a *pro forma* defendant such a notice is necessary and in computing the period of two months the day on which it was actually served must be excluded.

The Government Pleader (*K. Kuttikrishna Menon*) for Petitioner.

D. V. Reddi Pantulu for Respondent.

K.S.

Kuppuswami Ayyar, J. Angamuthu Pillai *v.* Subba Rao.
16th October, 1942.

A.A.A.O. No. 195 of 1941.

Civil Procedure Code (V of 1908), Order 21, rule 66—Failure of judgment-debtor to attend Court in answer to notice under Order 21, rule 66—If estops him from contending that the terms of the proclamation as fixed by the Court were incorrect.

In fixing the terms of the sale proclamation all the orders passed are not judicial orders—several of them being only administrative ones—and if a judgment-debtor failed to appear in Court and raise his objections, he would not be estopped from raising those objections at a later stage. By the mere fact that the judgment-debtor did not attend Court in answer to a notice to him under Order 21, rule 66, it cannot be said that he could be estopped from contending that the terms of the proclamation as fixed by the Court were incorrect, or that the sale had not been properly proclaimed and that the Court had committed an irregularity which vitiated the sale.

K. G. Srinivasa Aiyar for Appellant.

S. Parthasarathi and *V. K. Thiruvenkatachari* for Respondent.

K.S.

Happell, J. Jalajakshi *v.* Narayanan Nayar and others.
19th October, 1942.

C.R.P. No. 1648 of 1941.

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 89, *clause* (i) (b)—*Scope.*

The petitioner held a decree for the payment to him as costs of two sums namely Rs. 121-12-8 and Rs. 128-0-9. She took out execution and in the proclamation of sale there was an omission to show the sum of Rs. 121-12-8. The property was sold and a junior member of the judgment-debtor's tarwad, filed an application for the sale to be set aside under Order 21, rule 89 and deposited a sum of Rs. 158 in compliance with the terms of that rule. The amount for the recovery of which the sale was ordered was no doubt Rs. 121-12-8, plus Rs. 128-0-9.

Held: According to the plain meaning of the words in the rule "the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered" the amount deposited was sufficient and the sale must be set aside. A.I.R. 1935 Lah. 423, approved.

O. T. G. Nambiar for Petitioner.

P. Govinda Menon for Respondent.

K.S.

Bell, J. Mohammad Usman and Company *v.* Kottekkaran Kunhamu.
21st October, 1942.

C.R.P. N. 1911 of 1941.

Civil Procedure Code (*V of* 1908), *Order* 38—*Arrest before judgment—Debtor finding surety under Order* 38, *rule* 2—*Surety obtaining discharge after passing of decree under rule* 3—*Necessity to call upon defendant to find fresh surety—Proper procedure.*

A plaintiff obtained an order under Order 38, Code of Civil Procedure, for the arrest of the defendant before judgment. The defendant found surety under Order 38, rule 2. This surety, after decree applied for his discharge, under Order 38, rule 3 and as the conditions were complied with he was discharged. The Court thought that the decree having been passed Order 38 was no longer applicable, but something in the nature of proceed ings under section 51 of the Code of Civil Procedure was. On revision,

Held: As the arrest of the debtor was made under Order 38, the proceedings must continue under that Order. The Court must therefore call upon the defendant to find fresh security under rule 3 and if he fails to comply with that or any other order under rule 2 or 3, the Court has a discretion to commit him to prison.

B. Pocker for Petitioner.

O. T. G. Nambiar for Respondent.

K.S.

Kuppuswami Ayyar, J. Province of Madras *v.* Vellayan Chettiar and others.

21st Octbber, 1942.

S.A. No. 867 of 1941.

Zamindari—Use of property as cremation ground for 60 years—Maxim presumitur retro—*If applicable.*

It was found that the use of certain property within a Zamindari as a cremation ground started only sixty years ago, in any event within hundred years and did not go beyond that. It was contended on behalf of the Government that it should be presumed that even before that it must have been a cremation ground by the application of the maxim, *presumitur retro* and that if it could be so presumed it would follow that it was a cremation ground on the date of the Permanent Settlement in 1803 and that the legal ownership would be in the Government and the Zamindar's representative could not claim any right in it after it ceased to be used as a cremation ground.

Held: It was only a rebuttable presumption. If the land was used as cremation ground only for 60 years it must have been waste land before

that and the burden is on the Government to prove that it was excluded from the grant of the Zamindari. In the absence of any evidence, there is justification for finding that the property belonged to the Zamindar.

The Government Pleader (*K. Kuttikrishna Menon*) for Appellant.

V. Ramaswami Aiyar for Respondent.

K.S.

Byers, J. Raju Naidu and another—Accused.
26th October, 1942.

Crl.R.C. Nos. 571 and 572 of 1942.
(Crl.R.P. Nos. 544 and 545 of 1942.)

Motor Vehicles Act (IV of 1939), section 71 (2).

The provisions of section 71 (2) of the Motor Vehicles Act are mandatory and it is necessary before a speed limit can be enforced that there should be a prior notification in the Gazette.

K. S. Jayarama Aiyar for G. Natarajan for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Horwill, J. Mangeshwar Srimad Ananthishwar Temple
2nd November, 1942. *v.* Vaikunta Baktha and others.

S.A. No. 407 of 1941.

Madras Hindu Religious Endowments Act (II of 1927), section 73—Scope—Suit for accounts and damages against ex-trustees of a temple—Previous consent of the Board not necessary.

A suit by the present trustees of a temple against the past trustees for a general account of their management along with a claim for recovery from them of damages said to have been sustained by reason of their alleged misfeasance, malfeasance and nonfeasance is maintainable under the general law. The previous consent of the Board under section 73 of the Madras Hindu Religious Endowments Act is not necessary for such a suit. For deciding whether such consent is necessary the tests applicable are the same as those in suits under section 92 of the Civil Procedure Code.

B. Sitarama Rao and *M. G. Kamath* for Appellants.

K. Rajah Aiyar, M. L. Nayak and *K. P. Sarvothama Rao* for Respondents.

K.S.

Horwill, J.
12th October, 1942.

Vasudeva Aithala *v.* Krishna Aithala and others.
A.A.O. No. 418 of 1941.

Hindu Law—Joint family—Agreement to give up right to partition—When enforceable.

A coparcener cannot be deprived of his ordinary rights under Hindu Law to claim a partition of the family property unless it is very clear that he bound himself for consideration not to exercise that right; and even then it is doubtful whether such an agreement would not be against public policy. Assuming that there is nothing invalid in law in an agreement to give up one's right to partition, such a renunciation must be very clear and explicit.

K. Vittal Rao for Appellant.

T. Krishna Rao for Respondent.

K.S.

Mockett and Abdur Rahman, JJ.
16th October, 1942.

Chinnaswami Naidu *v.* Oomai *alias* Perumal Naidu and others.
Appeal No. 113 of 1939.

Transfer of Property Act (IV of 1882), *section* 43—*Scope—Transferee acting on erroneous representation—No enquiries made by him—Effect on his right.*

Where a transferee has acted on the representation erroneously made by a person that he was authorised to transfer the property, it cannot be contended when such transferee seeks relief under section 43 of the Transfer of Property Act, that the plaintiff though he had believed and acted on the erroneous representation nevertheless had not been industrious in making enquiries. There is no authority for the proposition that such enquiries are necessary.

28 M.L.J. 44 and 34 Mad. 159, considered.

K. V. Ramachandra Aiyar and *S. Thyagaraja Aiyar* for Appellant.

T. L. Venkatarama Aiyar for Respondent.

K.S.

Horwill, J.
19th October, 1942.

Govindaswami Chettiar *v.* Tirupur Lakshmi Vilas Nidhi, Limited.
C.R.P.No. 1628 of 1941.

Appeal—Insolvency Court refusing to order prosecution of insolvent—Creditor who brought the matter to the notice of the Court not entitled to appeal.

An insolvent allowed a large number of debts due to him to become time-barred with the result that great loss accrued to the creditors. One of the creditors put in a petition to the Insolvency Court drawing its attention to this matter and the Court after considering whether it would order a prosecution of the insolvent dismissed the creditor's application saying that sending the insolvent to the jail would not help the creditors to get their money and it was pure vindictiveness on the part of the creditor to file the application. The creditor appealed and the District Judge ordered that the complaint should be filed. On revision,

Held: The lower appellate Court had no jurisdiction to entertain the appeal except on the motion of some person aggrieved and a creditor is not a person aggrieved by an order refusing to prosecute the insolvent. The Crown, the State, or some public officer, possibly the Official Receiver might be a person aggrieved but not an individual creditor who has lost nothing by the insolvent not being prosecuted.

P. Govinda Menon for Petitioner.

M. Krishna Bharathi for Respondent.

K.S.

N R C

Happell, J. Srinivasa Mudaliar *v.* Ramudu Naidu.
20th October, 1942.

C.R.P. No. 1725 of 1941.

Provincial Small Cause Courts Act (IX of 1887), *section* 34 *and Civil Procedure Code (V of* 1908), *section* 73 *and Order* 21, *rule* 82—*Scope.*

If for the purposes of execution a small cause decree has to be transferred to the original side of the Court though presided over by the same Judge for the reason that the sale of immovable property in execution of that decree can only be ordered by a Court other than a Court of Small Causes, the assets received by reason of the sale in execution of the decree must be regarded as received on the original side of the Court.

24 M.L.J. 601, relied on.

Under section 73 of the Code of Civil Procedure in order that a decree-holder may be entitled to rateable distribution an application has to be made for execution to the Court holding the assets before the receipt of those assets. Accordingly a person holding another small cause decree asking for rateable distribution where immovable properties are sold in execution of a small cause decree must apply to the Court other than the Small Cause Court, though the same Judge is exercising small cause and original jurisdiction.

S. Ramachandra Aiyar for Petitioner.

R. Viswanathan and *N. D. Varadachari* for Respondent.

K.S.

Kuppuswami Ayyar, J. Calicut Bank, Ltd. (in liquidation) *v.* Mekkat.
21st October, 1942.

A.A.A.O. Nos. 179 and 181 of 1940.

Companies Act (VII of 1913), *section* 171—*Bank a puisne mortgagee party to mortgage suit and execution—Liquidation of bank—Leave of Court to proceed with execution—Necessity.*

A bank which was a puisne mortgagee was a defendant in a mortgage suit and execution proceedings. After the bank went into liquidation the decree-holder continued execution proceedings without obtaining sanction of the Court under section 171 of the Companies Act.

Held, (1) A puisne mortgagee is also a person liable to pay the amount due under the mortgage decree.

(1940) 2 M.L.J. 513, relied on.

(2) The word "proceedings" in section 171 of the Companies Act need not necessarily relate to independent originating proceedings, but may relate to supplemental proceedings also like execution under a judgment in an action. The object of the section is to enable the Court, which ordered the liquidation or winding up of a company to know whether it will be necessary to continue the execution proceedings against the company and whether it will not be advisable to adjust the matter out of Court and to give the necessary instructions to the liquidator.

I.L.R. 1941 Lah. 760, dissented from.

I.L.R. 58 Mad. 781 and (1880) Ch.D. 502, applied.

V. K. John and *R. Rajeswara Rao* for Appellants.

C. S. Swaminathan, V. Radhakrishnayya, K. P. Ramakrishna Aiyar and *R. V. Sundara Reddi* for Respondents.

K.S.

Horwill, J. Rathnasabapathy Odayar *v.* Ramayya Pillai and others.
22nd October, 1942.

A.A.O. No. 390 of 1941.

Provincial Insolvency Act (V of 1920), *sections* 33, 50 (2) *and* 68—*Official Receiver entering name of creditor in schedule—Expunging such name—Procedure.*

After a transfer of property by an insolvent was set aside under section 54 of the Provincial Insolvency Act the transferee filed an application before the Official Receiver to enter his name in the schedule of creditors for the sum which the District Judge had found to have been good consideration while setting aside the sale. The Receiver, instead of issuing

notice, as he should have done, under section 33 (3), admitted the claim whereupon one of the creditors filed an application under section 50 (2) of the Act to the District Judge to have the entry expunged from the schedule of creditors on the ground that no notice had gone to the creditors, that the Official Receiver was interested in the matter, and that inquiry would show that very little consideration had passed. The District Judge considered that the real remedy of the creditor was under section 68 to apply to the Court against the order of the Receiver within twenty one days and as it had not been done, he dismissed the application. On appeal,

Held: (*i*) As section 50 (2) deals specifically with an application to expunge an entry, it is not necessary that an application for that purpose should be made within twenty one days, as an application under section 68 should.

(*ii*) In considering an application under section 33 to enter a creditor's name in the list of creditors though the Official Receiver would be acting in a judicial capacity he would be bound by a prior decision, only if that decision operated as *res judicata*.

(*iii*) As in the instant case even if notice had gone to the other creditors the Receiver would have included the name of the transferee whose purchase had been set aside as creditor, the name ought not to be expunged.

A. V. Viswanatha Sastri for Appellant.

C. R. Pattabhiraman, R. Rajagopalachari and *S. V. Rama Aiyangar* for Respondents.

K.S.

Horwill, J. Pitchiah *v.* Venkatappayya.
23rd October, 1942.

S.A. No. 706 of 1940.

Madras Survey and Boundaries Act (IV of 1897)—Suit arising out of decision of Survey Officer—Government, if can be impleaded.

The Survey Officer, giving a decision under the Survey and Boundaries Act, although a Government servant, acts in a judicial capacity and accordingly Government ought not to be impleaded as a party in a suit that arises out of the decision of the Survey Officer.

K. Kuppuswami for Appellant.

Ch. Raghava Rao and the Government Pleader (*K. Kuttikrishna Menon*) for Respondents.

K.S.

Kuppuswami Ayyar, J. Official Receiver, Tinnevelly *v.* Ramakrishna Aiyar and others.
23rd October, 1942.

A.A.A.O. No. 47 of 1940.

Hindu Law—Joint family—Decree against father and his sons—Insolvency of father—Execution against family assets in the hands of sons—Permissibility.

A decree was obtained against *X*, a Hindu father and his undivided sons and grandsons, the liability against the latter being fixed under the pious obligation doctrine. In execution of the decree *X* was exonerated and the decree was sought to be executed against the ancestral properties in the hands of the sons and grandsons who had become divided from *X*.

Held: As the decree had been obtained against the father and also against the sons to the extent of their joint family properties it will be open to the decree-holder to proceed against any of those persons against whom he had obtained the decree. There was no extinguishment of the decree merely because the decree-holder stated in the execution petition that he exonerated *X*. A debt could be extinguished only by payment or by operation of law.

I.L.R. 40 Mad. 581, distinguished.

R. S. Srinivasacharya and *K. V. Rajagopalan* for Appellant.

K. S. Sankara Aiyar for Respondent.

K.S.

Kuppuswami Ayyar, J.
27th October, 1942.

Subbier *v.* Seth Tahalram Dayaldar Firm.
A.A.A.O. No. 40 of 1942.

Partnership—Power of attorney by firm to an agent—Death of one of the partners—Effect—Execution petition by power of attorney agent not maintainable.

In the case of partnership firms where a power is granted by all the partners the agency terminates on the death of one of the partners.

(1938) 1 M.L.J. 610, relied on.

I.L.R. 1937 Nag. 28 and 21 C.W.N. 620, not followed.

Accordingly an execution petition filed by a power of attorney agent signed as agent of the firm and not as the agent of the surviving partners is not maintainable.

A. Swaminatha Aiyar for Appellant.

K. V. Srinivasa Aiyar for Respondent.

K.S.

Happell, J.
29th October, 1942.

Palani Goundan *v.* Kali Ammal and others.
C.R.P. No. 1429 of 1941.

Hindu Law—Suit by co-widow against her husband's brother alleging a partition claiming her husband's share—Other widow opposing her claim alleging that there was no partition—Valuation of suit for jurisdiction.

Plaintiff and the third defendant were co-widows and a suit was brought by the plaintiff in the Court of the Subordinate Judge for partition of the whole of the husband's share in joint family property alleging an oral partition from the first defendant before the husband's death. The third defendant in her written statement denied the fact of partition and stated that in any event she did not want separation of her share. In the circumstances,

Held, that the plaintiff was entitled to sue only for her half share of the husband's property and where the value of such share was only Rs. 750 the suit cannot be filed in the Court of the Subordinate Judge but should have been filed in the Court of the District Munsiff. The plaint must therefore be returned for presentation to the proper Court.

21 M.L.J. 997, relied on.

T. V. Ramanatha Aiyar and *T. S. Venkatarama Aiyar* for Petitioner.

T. K. Subramania Pillai for Respondent.

K.S.

Horwill, J.
2nd November, 1942.

Chinnammal *v.* Alwar Naidu.
C.R.P. No. 1888 of 1941.

Civil Procedure Code (V of 1908), Order 47, rule 1—Application for review—If can be allowed merely because of default of appearance of other side.

A review application does not lie on any ground other than those set out in Order 47, rule 1. Accordingly a Court has no jurisdiction to allow a review application because of default of appearance of the other side.

K. Srinivasan and *N. T. Ragunathan* for Petitioner.

V. Srinivasan for Respondent.

K.S.

Horwill, J. Papamma *v.* Official Receiver, Cuddapah.
2nd November, 1942. **S.A. No. 533 of 1941.**

Provincial Insolvency Act (V of 1920), *sections* 4 *and* 5—*Application under for a declaration that property belonged to applicant and for injunction restraining Official Receiver from including it in the estate of insolvent and selling it—Dismissal for default and dismissal of application for restoration of same—If bars subsequent suit for that relief—Civil Procedure Code (V of* 1908), *Order* 9, *rule* 9—*Applicability.*

The Official Receiver proceeded to sell the suit property as if it were the property of the insolvent and early in the administration the plaintiff (the insolvent's daughter) filed an application under sections 4 and 5 of the Provincial Insolvency Act asking for a declaration that the property in question belonged to her and for an injunction restraining the Official Receiver from including that land in the estate of the insolvent and selling it. On 29th November, 1937, the District Munsiff, dismissed the application for default of appearance. She then filed an application to restore the petition, which was dismissed on the ground that she had frequently defaulted and that her application was not a *bona fide* one. She then filed a suit against the Official Receiver, again setting up her title to the land. The Official Receiver raised the preliminary objection that the matter had been concluded by the order on her earlier petition and both the District Munsiff and the District Judge in appeal upheld the objection. On second appeal,

Held: As the earlier petition was not disposed of on the merits but was dismissed for default of appearance, section 4 of the Provincial Insolvency Act was no bar to the plaintiff filing a suit.

By virtue of section 5 (2) of the Provincial Insolvency Act, in regard to proceedings under that Act, the Courts have to follow the same procedure as they have and follow in respect of suits. Accordingly the first part of Order 9, rule 9 of the Civil Procedure Code must be applied. But as the wording of section 5 (1) of the Provincial Insolvency Act has regard only to "proceedings under the Act" the "suit" will not be barred.

The equitable principle of election which is only a special application of the general principle of *res judicata* cannot be applied as otherwise there would be no need for section 4 (2) of the Act. Even if it were to apply it may not bar a fresh proceeding when the point in issue had not been considered in the earlier proceeding.

T. K. Srinivasa Thathachariar for Appellant.

A. Bhujanga Rao and *D. R. Krishna Rao* for Respondent.

K.S.

Krishnaswami Ayyangar and Kunhi Raman, JJ. Kunhi Kammaran Nair *v.* Sulaiman Haji and others.
2nd November, 1942. **A.A.O. No. 5 of 1941.**

Civil Procedure Code (V of 1908), *section* 36—*Scope—Order that "receiver do recover Rs.* 1,500 *from the assets of the plaint temple"—Executability.*

Where an order was "This Court doth order and decree that the receiver petitioner do recover Rs. 1,500 from the assets of the plaint temple" and execution therein when sought was resisted on the ground that it was merely declaratory in character,

Held: The language of the order does not show that it was the intention of the Court merely to declare a liability leaving it to be enforced by an independent suit. The language of section 36 of the Civil Procedure Code (1908), which has repealed section 649 of the Code of 1889 is wider in its operation and can cover a case where a receiver is the person in whose favour an order like the one in the present case has been passed. Such an order is executable.

I.L.R. 52 Cal. 269 and A.I.R. 1934 Lah. 46, relied on.

10 M.L.J. 241, distinguished.

N R C

P. Govinda Menon for Appellant.

K. Kuttikrishna Menon, P. V. Rajamannar and *K. M. Balasubramaniam* for Respondent.

K.S.

Krishnaswami Ayyangar and Kunhi Raman, JJ.
2nd November, 1942.

Ramanathan Chettiar *v.* Kasi Chettiar and others.
A.A.O. No. 305 of 1942.

Civil Procedure Code (V of 1908), Order 21, rule 29—Order under—"Stay pending disposal of suit"—Scope—If extends to appeal on the suit.

The word "suit" in rule 29 of Order 21 of the Civil Procedure Code means the suit and not the appeal or appeals therefrom to the appellate Court.

I.L.R. 55 Cal. 512 and I.L.R. 58 Cal. 1113, relied on.

1915 M.W.N. 844, considered and distinguished.

Accordingly stay granted under Order 21, rule 29 "until decision of C.S. No. * * * on the file of the lower Court" cannot continue even after disposal of the suit.

A. Swaminatha Aiyar for Appellant.

V. Ramaswami Aiyar, N. G. Krishna Aiyangar and *S. Thyagaraja Aiyar* for Respondents.

K.S.

Horwill, J.
4th November, 1942.

Meenakshi and another (minors) *v.* Ayyamperumal Udayan and others.
C.R.P. No. 347 of 1942.

Civil Procedure Code (V of 1908), section 35-A—"Party"—Next friend of minor—If can be made liable for compensatory costs under section 35-A.

Section 35-A of the Civil Procedure Code is, as it were, an appendix to section 35 and is intended to deal with some exceptional cases for which the exercise of ordinary discretion of the Court under section 35 could not afford a sufficient compensation. Strictly speaking there can be no "party" to a suit other than a plaintiff or a defendant; but cases have occurred in which the word "party" has been given a more vulgar interpretation. Section 35-A speaks of the party objecting to the claim or the "party by whom such claim or defence has been put forward". Accordingly the next friend of a minor plaintiff can be made liable for compensatory costs under section 35-A as well as for ordinary costs under section 35.

K. S. Desikan for Petitioner.

N. Suryanarayana for Respondent.

K.S.

Abdur Rahman, J.
6th November, 1942.

Venkitarama Aiyar *v.* Ulattil Pachus.
C.R.P. No. 2458 of 1941.

Madras Debt Conciliation Act (XI of 1936), section 27—Time taken in obtaining certified copies of Board's orders excluded for purposes of limitation—Computation—Copies sent by post under rule 22 of rules framed under section 29—Effect.

The only procedure provided under the Debt Conciliation Act for delivery of certified copies of its orders is to send them by post. For computing the period of limitation for filing a suit by a creditor the period till the delivery of the copies by the post office to the creditor must be excluded under section 27 of the Debt Conciliation Act as time taken in obtaining the certified copies of the Board's orders.

Where copies are sent to the parties by the Board under rule 22 of the rules framed under section 29 of the Act, the Post Office must be held to be the agent of the copying department and not of the party.

N. R. Sesha Aiyar for Petitioner.

D. A. Krishna Variar for Respondent.

K.S.

Kunhi Raman, J.
6th November, 1942.

Sivathi Ammal and others *v.* Meikola Odayar and others.
S.A. No. 919 of 1941.

Civil Procedure Code (V of 1908), Order 22, rule 9 (1)—Scope—"Subject-matter"—To be construed strictly.

While a suit for an injunction preventing the defendants in that suit from trespassing upon the subject-matter of that suit was pending a petition was filed for impleading *X*, *Y* and *Z* as party defendants for the alleged reason that they were also threatening to trespass upon the subject-matter of the litigation. The petition was dismissed. Thereupon the plaintiff in that suit applied for permission to withdraw the suit with liberty to bring a fresh suit. Such permission was granted and the suit was accordingly withdrawn and dismissed. Subsequently that plaintiff along with three others filed a fresh suit praying for a declaration of the plaintiff's title to the property and for an injunction. It was contended by *X*, *Y* and *Z* who were some of the defendants in the second suit that in view of the provisions of Order 22, rule 9 of the Code of Civil Procedure the suit was not maintainable against them.

Held: The cause of action in the two suits was not the same. In the earlier suit the allegation was that the defendants were threatening to trespass upon the property but there was no prayer for declaration of title. The expression "subject-matter" must be construed strictly in a penal provision of this character. Accordingly Order 22, rule 9 of the Civil Procedure Code does not operate as a bar to the later suit.

I.L.R. 39 Mad. 987, applied.

V. Meenakshisundaram for Appellant.

R. Kesava Aiyangar for Respondents.

K.S.

Kuppuswami Ayyar, J.
10th November, 1942.

Ratnasamy Nadar *v.* Municipal Council, Virudnagar.
S.A. No. 44 of 1942.

Madras District Municipalities Act (V of 1920), section 182—Projection over air space over street—Prescriptive right acquired by owner of adjoining building—Removal by municipal council—Right of owner to compensation.

Under the Madras District Municipalities Act, the term "street" as vested in the municipal council would include not only the surface of the soil but also the space above it and beneath it to an extent of about twelve feet as is necessary for repairing and management of the street by the municipality.

As section 182 of the Municipalities Act gives power to the Chairman to remove any projection from a building "in or over" a street he can call upon the owner to remove the same, however high in the air such projection may be. Where however the projection has existed sufficiently long to give the owner a prescriptive right, the owner is entitled to have a declaration that it could not be removed without payment of compensation to him.

K. V. Srinivasa Aiyar for Appellant.

K. Kuttikrishna Menon for Respondent.

K.S.

Kuppuswami Ayyar, J.
10th November, 1942.

Nayudamma v. Dharamchand Kottavaru.
S.A. Nos. 354 and 355 of 1941.

Practice—Attachment before judgment—Dismissal of suit—Subsequent restoration on review and decree—Effect on attachment.

An attachment before judgment can be availed of by a plaintiff decree-holder whose suit was originally dismissed by the trial Court but was decreed subsequently, on a review petition filed by him. The attachment did not

terminate on the earlier dismissal of the suit and the purchasers of the property in the interval between the dismissal of the suit and the review cannot resist the decree-holder's right to proceed against the property.

V. Subramaniam for Appellant.

P. Satyanarayana Rao and *Y. G. Krishnamurthi* for Respondent.

K.S.

Kuppuswami Ayyar, J.
12th November, 1942.

Major John *v.* Meenakshi Mills, Ltd., Madura.
C.R.P. No. 859 of 1942.

Civil Procedure Code (V of 1908), sections 151 and 152—Scope.

Where in a suit for damages for breach of contract to sell property entered into by the receiver of an estate, a personal decree was passed against the receiver in addition to a decree against the estate and an application was made for amending the decree so as to delete the personal decree as being an accidental slip,

Held, that the remedy of the receiver was only by way of appeal against the decree and the application for amendment was unsustainable in law.

V. T. Rangaswami Aiyangar for Petitioner.

K. V. Srinivasa Aiyar for Respondent.

K.S.

Krishnaswami Ayyangar and Kunhi Raman, JJ.
16th November, 1942.

Secretary of State *v.* G. L. Kantha Rao.
A.A.O. No. 686 of 1941.

Interest—Pendency of appeal—Deposit of decree amount in Court to be drawn on furnishing security—Inability to furnish security—Amount invested in Imperial Bank—Dismissal of appeal—Decree-holder's right to interest.

The Government filed an appeal against a money-decree passed against it and deposited the decree amount in Court and obtained an order that the decree-holder should draw the amount deposited only on his furnishing security. On the decree-holder being unable to furnish security, the amount was at the request of the parties invested in fixed deposit in the Imperial Bank of India. On the dismissal of the appeal the decree-holder in execution claimed interest awarded under the decree from the date of deposit into Court till the date of the dismissal of the appeal, after giving credit to the interest earned by the fixed deposit in the Bank.

Held, that the decree-holder was entitled to the interest awarded by the decree. The deposit by Government being only conditional did not affect the decree-holder's right.

Held, further, that the fixed deposit was not intended to affect the decree-holder's right to interest, but was more for the benefit of the Government.

The Government Pleader (*K. Kuttikrishna Menon*) for Appellant.

D. Narasaraju and *V. Ramaswami* for Respondent.

K.S.

Kuppuswami Ayyar, J. Kunhikaruvan *v.* Raman Nambiar.
9th November, 1942. **C.R.P. No. 398 of 1942.**

Madras Elementary Education Act (VIII of 1920), *rule* 13 (*of the rules under*)—*Contract for payment by succeeding manager to his predecessor of a particular amount out of grant—If illegal as opposed to public policy.*

When the plaintiff handed over the management of a girl's school to the defendants' predecessor in interest there was an agreement that the plaintiff should be paid a particular amount every year and when plaintiff sued to recover it the defendants contended that such a contract was invalid as being opposed to the rules under the Elementary Education Act, rule 13 of which provided that not less than 85 per cent. of the teaching grant shall be paid to the teachers employed in it by way of salary.

Held, that inasmuch as out of the balance of the grant after giving 85 per cent. to the teachers the manager may take some amount as remuneration for himself, if out of such amount the manager had agreed to pay the plaintiff any sum it would not make the contract illegal.

P. Chandrasekhara Menon for Petitioner.

A. Atchuthan Nambiar for Respondent.

K.S.

Kuppuswami Ayyar, J. South Indian Railway Company, Ltd.
9th November, 1942. *v.* Adam Hajee Peer Muhammad.
C.R.P. No. 2600 of 1941.

Railway—Consignment of sugar under risk note Forms A and H—Damage by rain water—Liability.

In a suit for damages against a Railway company claiming that some bags out of a consignment of sugar (booked under risk note forms A and H) got wet, *held*, (1) that the Railway Company cannot be made liable for damage caused by water going in through the crevices in the wagon on account of the force of the wind. 67 M.L.J. 704, relied on. (2) The burden of proving misconduct on the part of the railway company's servants as the cause of damage is on the plaintiff. (3) Where the Railway Company has explained the circumstances under which the goods were likely to have got damaged, for example by monsoon, and there was no evidence to show that the damage was not caused in that manner but by misconduct on the part of the Railway Company the plaintiff is not entitled to succeed.

S. S. Ramachandra Aiyar for Petitioner.

P. Govinda Menon for Respondent.

K.S.

Horwill, J. Yarlagadda Abbayi and another *v.*
12th November, 1942. Official Receiver, East Godavary.
A.A.A.O. No. 157 of 1941 converted into C.R.P. No. 1574 of 1942.

Provincial Insolvency Act (V of 1920), *sections* 53, 4 *and* 75—*Application asking for relief under section* 53 *linked with one under section* 4—*No second appeal lies.*

Where an application made for setting aside a partition decree on the insolvency of a Hindu father on the ground that it was fraudulently and collusively obtained was dismissed by the trial Court and on appeal the District Judge held the opposite view and set aside the partition decree, no second appeal lies merely because the relief asked for under section 53 was linked to one under section 4. Only decisions under section 4 should be the subject of second appeals.

P. V. Vallabacharyulu for Appellant.

M. S. Ramachandra Rao for Respondent.

K.S.

N R C

Kuppuswami Ayyar, J.
12th November, 1942.

Venkateswara Swami Varu, Bezwada *v.* Sub-Collector, Bezwada.
C.R.P. No. 640 of 1941.

Land Acquisition Act (I of 1894), *section* 18—*Validity of reference by Collector—Cannot be questioned by the Subordinate Judge acting as Land Acquisition Court.*

It is the duty of the Collector before he makes the reference under the Land Acquisition Act to decide on the materials before him whether he should make the reference or not, and if he wishes to make and does make a reference, it is not open to the Land Acquisition Court to go behind it. If it is not open to the High Court or any other authority to interfere when the land acquisition Officer refuses to make a reference, his decision must be equally final when he decides to make and does make a reference.

D. Narasaraju for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

K.S.

Kuppuswami Ayyar, J.
19th November, 1942.

Narayanaswami and others *v.* Venkataswami and others.
C.R.P. No. 2670 of 1941.

Court-Fees Act (VII of 1870), *section* 7, *clause* (10) (a)—*Contract by mortgagor to sell property to mortgagee in discharge of mortgage—Suit for specific performance—Court-fee payable.*

The plaintiff had a mortgage right over certain properties and it was arranged in 1937 that in view of the amount due under the mortgage certain properties should be conveyed to him, and there was a further clause that in case the properties were not conveyed he would be entitled to recover the money due under the mortgage. When Madras Act IV of 1938 was passed the amount due under the mortgage could be scaled down to Rs. 4,000. The mortgagors refused to execute a conveyance and the plaintiff filed a suit for specific performance of the agreement to convey or in the alternative for recovery of the amount due under the mortgage. The plaintiff valued the claim at Rs. 4,000 and paid court-fee thereon and contended that the contract was not really one of sale as only the unliquidated amount payable in respect of the mortgage without the same being ascertained was stated to be the consideration for the sale.

Held: The consideration was the amount due under the mortgage which must be taken as the price agreed to be paid for the conveyance. It was therefore clearly a sale because the price was capable of being ascertained in money. Accordingly the relief cannot be said to be incapable of being valued so as to attract the provisions of section 17 (*b*) of Schedule II of the Court-Fees Act and the suit is governed by section 7, clause (10) (*a*) of the Court-Fees Act and court-fee must be paid as on the amount due under the mortgage on the date of the contract, sought to be specifically enforced.

P. V. Rajamannar and *K. Subba Rao* for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) and *C. V. Dikshitulu* for Respondent.

K.S.

Kuppuswami Ayyar, J.
24th November, 1942.

Palaniappa Chettiar *v.* Subramanian Chettiar and others.
C.R.P. Nos. 2587 and 2589 of 1941.

Court-fees—Suit for dissolution of partnership and taking accounts—Court-fee payable.

In a suit for dissolution of partnership and taking of accounts the extent of the assets and what the assets are will have to be decided in the suit. The fact that incidentally the claim of certain other persons who are

not parties to the partnership agreement will be decided will not make it an additional prayer or a separate relief, to justify the plaintiff being called upon to pay additional court-fees.

I.L.R. 1940 Mad. 259: (1940) 1 M.L.J. 32 (F.B.), applied.

A. V. Narayanaswami Aiyar for Petitioner.

Respondent not represented.

K.S.

Byers, J.
26th November, 1942.

Piramanayaga Pandaram and others, *In re.*
Crl.R.C. No. 626 of 1942.
(Case Referred No. 45 of 1942).

Criminal Procedure Code (*V of* 1898), *sections* 349 (1) *and* 562—*Relative scope.*

There is a fundamental difference between the position of accused persons dealt with under section 349 and section 562 of the Code of Criminal Procedure. Under the former section the accused are sent by a Court to the superior Magistrate with an expression of the Court's opinion that they are guilty and it is then the duty of the superior Magistrate to pass judgment upon them according to law. Under section 562 the accused persons come before the superior Magistrate as convicted persons and he has no other option but to proceed under section 380 of the Code, and pass sentence upon them in accordance with his powers. Section 349 (1) (*a*) has no application to the procedure under section 562 of the Code. It is open to a Magistrate to sentence some of the accused and refer the remainder to the superior Magistrate for the application of section 562 of the Code.

1936 M.W.N. 1351, not approved.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*), on behalf of the Crown.

K.S.

Somayya, J.
26th November, 1942.

Srinivasalu Chetty and another *v.*
Muniswamy Chetty and others.
S.A. No. 461 of 1941.

Limitation Act (*IX of* 1908), *section* 6 *and Article* 125—*Alienation by limited owner—Reversioner then alive being minor—Subsequently born nearer reversioners—Suit for declaring alienation not to be binding on reversion—Time-limit—Extended period of limitation whether available.*

If the existence of a reversioner clothes an after-born reversioner with a right to sue, though an after-born reversioner cannot claim the benefit of section 6 of the Limitation Act in his own right, he cannot be deprived of the extended period available to the reversioner in existence at the time of the alienation.

The plaintiffs sued as reversioners for a declaration that certain alienations of the properties of their maternal grandfather were not binding on them beyond the lifetime of their mother. In 1920 when the primary alienation was made the plaintiffs were not born, and there was then in existence another reversioner who was an infant one year old. The two minor plaintiffs who were subsequently born sued by their next friend in 1937, and at that time the person who was the reversioner at the time of the alienation was also alive. The defendants contended that the suit was barred by limitation.

Held, that the suit was not time-barred as the plaintiffs were entitled to institute the suit at any time during which the person who was the reversioner at the date of the alienation could have filed the suit, and that they were also entitled to the extended period available to that reversioner by virtue of his minority.

I.L.R. 18 Lah. 395 and 79 I.C. 1019, relied on.

41 L.W. 610 and I.L.R. 47 All. 165 (P.C.), considered.

B. V. Viswanatha Aiyar for Appellants.

K. S. Desikan and *T. V. Ramanatha Aiyar* for Respondents.

B.V.V.

Krishnaswami Ayyangar, J. Gowrammal *v.* Subbappa.
27th November, 1942. **S.A. No. 309 of 1941.**

Gift of immovable property—Absence of registered instrument—Oral evidence—Materiality on question of prescriptive title of donee—Donee's possession through agents or trustees sufficient for perfecting title by prescription.

A gift of immovable property cannot be made except by a registered instrument as required by section 123 of the Transfer of Property Act. The defect cannot be cured either by the evidence of persons who were present at the time of the oral gift or of those to whom the donors owned to having made the gift. While such evidence may be valueless as substitutes for a written instrument, its materiality on the question of the prescriptive title set up by the donee is beyond question. *Varada Pillai* v. *Jevarathnammal,* I.L.R. 43 Mad. 244: 38 M.L.J. 313 (P.C.), referred to.

It is sufficient for the acquisition of prescriptive title that the donee had been in possession for the statutory period through her trustees or agents for the cultivation of the land on her behalf and actual physical possession is not essential.

Williams v. *Pott,* L.R. 12 Eq. 149; *Mitchell* v. *Morley,* (1914) 1 Ch. 438 and *Secretary of State* v. *Krishnamoni,* I.L.R. 29 Cal. 518 (P.C.), referred to.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Appellant.

A. C. Sampath Aiyangar for Respondent.

K.S.

Krishnaswami Ayyangar, J. Nimmkampalli Ibrahim, *In re.*
30th November, 1942. **S.A. No. 1299 of 1942.**

Court-fees—Court-fee paid in pursuance of an order of taxing officer made after hearing the appellant—No right to refund—Order of taxing officer final under section 5 of the Court-Fees Act.

Where the court-fee was paid in pursuance of an order of the taxing officer made after hearing the appellant, that order being final under section 5 of the Court-Fees Act there is no right to claim a refund subsequently.

Kasturi Seshagiri Rao and *Kasturi Sivaprasada Rao* for Appellant.

P. Ananthan Nair for the Government Pleader (*K. Kuttikrishna Menon*), on behalf of the Crown.

K.S.